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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 995.

THE UNITED STATES EX REL. THE LA ABRA SILVER MINING COMPANY, PLAINTIFF IN ERROR,

vs.

FREDERICK T. FRELINGHUYSEN, SECRETARY OF STATE.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 1, 1883.

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1 *Petition of La Abra Silver Mining Co. for mandamus.*

In the supreme court of the District of Columbia.

THE UNITED STATES EX RELATIONE LA ABRA Silver Mining Company
vs.
FREDERICK T. FRELINGHUYSEN, SECRETARY of State.
No. 24055.

To the supreme court of the District of Columbia:

The petition of La Abra Silver Mining Company respectfully shows:

I. That your petitioner is a corporation created and organized under the laws of the State of New York, and has its office in the city of New York, in that State.

II. That on the fourth day of July, 1868, a convention between the United States of America and the Republic of Mexico for the adjustment of claims of citizens of each country against the other, was concluded, and which provides, in substance and effect, that the claims presented under said convention should be decided by two commissioners conjointly, or, in case of their disagreement, by an umpire, who were to be appointed and chosen, and were to qualify in the manner therein specified, as by
2 reference to said convention will fully appear, and to which your petitioner begs leave to refer; that thereafter said convention was duly ratified by each party thereto, and the commissioners and umpire therein provided for were duly appointed and chosen, and thereupon they severally duly qualified as such and entered upon their duties under said convention.

III. That the claim of your petitioner, as said corporation, against the Government of the Mexican Republic, arising from injuries to its property by the authorities of that Republic, was presented to the joint commission so established under said convention as aforesaid, within the time and in the manner and form thereby required, and for about six years, from 1869 to 1875, your petitioner, at much expense and trouble, prosecuted its said claim before the said commission, and the same was fully and ably contested during that period by the Mexican Government, numerous witnesses having been examined and a large amount of evidence having been taken and submitted to said commission by both sides, and thereupon such proceedings were thereafter had in the matter of said claim that, the said commissioners having disagreed, Sir Edward Thornton, the said
3 umpire, who had been duly chosen and had duly qualified as aforesaid, on the 27th day of December, 1875, made a decision on said claim and an award thereon in favor of your petitioner and against said Republic of Mexico for sums and interest thereon, which together, as officially estimated and admitted by the Department of State of the United States, amount to the sum of $683,041.32, Mexican gold dollars, and that the sum last aforesaid is the amount of said award; that hereunto annexed, marked "Exhibit A," and made a part of this petition, is a copy of said decision and award; that the original thereof is on file in said Department of State, and that the fact of the rendition of said award is not disputed.

And your petitioner further shows:

IV. That the 2nd article of the convention aforesaid binds the two Governments "solemnly and sincerely to consider the decision of the commissioners conjointly, or of the umpire as the case may be, as absolutely final and conclusive upon each claim decided upon by them or him respectively, and to give full effect to such decisions without any ob-
4 jection, evasion, or delay whatsoever;" and that in and by the 5th article of said convention said Governments agree to consider the result of the proceedings of said commission as a full, perfect, and final settlement of every claim upon either Government arising out of any transaction of a date prior to the exchange of the ratifications of said convention, and that every such claim shall, from and after the conclusion of said proceedings, be considered and treated as finally settled, as by reference to said articles will fully appear.

V. That after the rendition of said award in favor of your petitioner, and on the 29th day of April, 1876, a convention was concluded between said two Governments, and the same was subsequently duly ratified for extending the functions of the umpire under the convention of July 4th, 1868, and that said convention of April 29th, 1876, in and by the 2d article fully recognized and provided for the payment of the total amount awarded in all cases already decided, whether by the commissioners or by the umpire, as well as in cases subsequently to be decided, as by reference to said last mentioned convention will fully appear and to which your petitioner begs leave to refer.

5 VI. That on the 14th day of December, 1876, the expenses of said commissions were adjusted pursuant to the 6th article of said convention of July 4th, 1868, and the account thereof stated, and a balance therein as between said two Governments checks, and the same, and a protocol of the same date for the purpose of said adjustment, were signed by the Secretary of State of the United States and the Minister Plenipotentiary of the Mexican Republic; that in said account the United States is charged with the percentage of said expenses upon the total amount of the awards made under said conventions against the Republic of Mexico, in which total amount is included the amount of said award in favor of your petitioner; that the amount of said percentage on said award is $28,550, or thereabouts, and that in said protocol it is stated that said Secretary and Minister have caused the said account to be stated and have approved the same under their respective hands, as will more fully appear by said account and protocol on file in said Department of State, and to which your petitioner begs leave to refer for greater certainty.

And your petitioner further shows:

6 VII. That your petitioners is advised and believes and so swears, that by virtue of the facts and matters aforesaid, the said award in favor of your petitioner was made, "final and conclusive," and was and is the judgement of a tribunal of competent jurisdiction, and was and is property, and the right to which as property was thereby vested in your petitioner.

And your petitioner further shows:

VIII. That the total amount of the awards rendered under said conventions in favor of citizens of the United States was greater than the total amount of those rendered thereunder in favor of citizens of Mexico, and that pur-

suant to the provisions of said conventions, the Government of Mexico has made sundry annual payments of $300,000 each upon the balance of said awards against the Republic of Mexico remaining after deducting one of said total amounts from the other, and the money so paid has been received by the Secretary of the United States.

And your petitioner further shows:

IX. That on the 18th day of June, 1878, the act of the Con-
7 gress of the United States entitled "An act to provide for the distribution of the awards made under the convention between the United States of America and the Republic of Mexico, concluded on the fourth day of July, eighteen hundred and sixty-eight," was approved, and by the first section thereof the Secretary of State is required "to receive any and all money which may be paid by the Mexican Republic under and in pursuance of the conventions of July 4th, 1868, and April 29th, 1876, aforesaid," and whenever and as often as any installments shall have been paid by the Mexican Republic on account of said awards to distribute the money so received in ratable proportions among the corporations, companies, or private individuals, respectively in whose favor awards have been made "or to their legal representatives or assigns," as by reference to said act will fully appear.

X. That your petitioner is advised and believes and so swears, that by said act of Congress the money paid by the Republic of Mexico is placed in the hands of the Secretary of State, as a trustee, to be paid to the
8 respective claimants in the proportion required by said law; that the receipt and payment of said money by said Secretary are ministerial acts *namely*; and it is the duty of said Secretary, as a mere ministerial act, to pay to the respective claimants their respective proportions thereof.

And your petitioner further shows:

XI. That the 5th section of said act of Congress provides in words and substance, that "the President of the United States be requested to investigate any charges of fraud presented by the Mexican Government" in the case of your petitioner, and if he shall be of opinion that the honor of the United States, the principles of public law, or considerations of justice and equity require that the award in the case of your petitioner shall be opened and the case retried it shall be lawful for him to withhold payment of said award until the case shall be retried and decided in such manner as the Government of the United States and Mexico may agree, or until Congress otherwise direct, as by reference thereto will fully appear.

9 XII. That your petitioner does not admit, but wholly denies the right and power of Congress to pass the provisions of said act for the retrial of the case in any contingency whatever; nevertheless the President, through the honorable Wm. M. Everts, then the Secretary of State, did make the investigation, supposed to be authorized by the said laws, of the charges of fraud presented by the Mexican Government, and after having heard full argument, on both sides by the attorneys of Mexico and of your petitioner, did, in 1879, decide that neither the principles of public law nor considerations of justice or equity require or permit, as between the United States and Mexico, that the award in this case shall be opened and the case retried before a new international tribunal, or under any new convention or negotiation respecting the same between the United States and Mexico.

XIII. That said decision was communicated to Congress by the President in a special message on the 15th of April, 1880, and is to be found in Senate Executive Document No. 150, 2nd session of the 46th
10 Congress, and to which reference is *handly* made for greater certainty.

XIV. Your petitioner submits that this decision of the President against a retrial of the case before any new international tribunal was a full performance of the duty attempted to be imposed on him by the law aforesaid, and fully exhausted his supposed authority derived therefrom; but the President suggested a further inquiry before some domestic tribunal to be established by Congress to ascertain whether or not there may have been a "fraudulent aggre'ation" of your petitioner's claim, while at the same time he held the said claim to be so far unassailable that he deemed it his duty to pay the petitioner's proper proportions of the three instalments which had been previously paid by Mexico, and accordingly the Secretary of State did then, in 1879, pay to your petitioner the sum of $135,655.58, which had been withheld under said law until that time; and, finally, the President, in suggesting in his said report of April 15th, 1880, that Congress might provide an adequate procedure "for
11 conducting the proposed additional investigation," concluded his decision with these words: "Unless Congress should now make this disposition of the matter and furnish thereby definite instructions, * * * it would appear to be the duty of the Executive to accept these awards as no longer open to reconsideration, and proceed in the payment of the same pro rato with all other awards under the convention." Prior to said report, and on or about the 31st of January, 1880, another instalment of $300,000, being the fourth instalment, was paid by Mexico under said conventions, of which your petitioner's proper proportions, by virtue of said awards, was $48,858.77, and Congress having adjourned on the 4th of March following, the President held the said award as no longer open to reconsideration, and the Secretary of State accordingly theretofore, in 1880, paid upon your petitioner's said award the said last-mentioned sum, its proper proportion of the said last-mentioned instalment, and subsequently, in 1881, a like sum, its proper proportion of the fifth instalment, which was paid by Mexico under said conventions on or about January 31st, 1881.

12 XV. Your petitioner not admitting but expressly denying all power in the Executive or in Congress, by means of either such new trial as the United States and Mexico might agree upon, as provided in said law, or by any other means, without the consent of your petitioner, which was never given, to set aside or impair the finality of said award, or your petitioner's vested interest therein, yet covers and charges that by the said decision*ing* of the President against any further trial or investigation, either before an international or domestic tribunal, all semblance or pretence of power to so retry, as conferred by said act of June 18th, 1878, became and was completely exhausted, and the duty of the Secretary of State to pay over said money and all future instalments became and was at the time of the demand hereinafter mentioned, and now is, imperative under said act of Congress.

And your petitioner further shows:

XVI. That on or about the 31st day of January, 1882, another,

13 the sixth, installment of $300,000 was paid by Mexico under said conventions to the Secretary of State (the honorable Frederick T. Frelinghuysen then and now being such Secretary of State), who received the same under said act of Congress; and that the proper proportion thereof payable upon the said award in favor of your petitioner is the sum of $48,858.77, which sum it was and is the plain duty of said Secretary of State, as a mere ministerial act, to pay to your petitioner and your petitioner's assignees, whose assignments are on file in said Department of State; and that on the 19th day of October, 1882, your petitioner caused a demand on said Secretary of State, at his office in Washington, D. C., to be made, on behalf of your petitioner and your petitioner's said assignees, for the payment to your petitioner and said assignees of said last-mentioned sum; and that your petitioner there and then, through its attorneys for that purpose duly constituted, demanded that said Secretary of State pay to your petitioner said last-mentioned sum, less the amount coming to
14 the assignees of your petitioner, which fully appears from their several assignments on file in said Department of State, but the same has not been paid to your petitioner, nor any part thereof, and to pay the same or any part thereof to your petitioner the said Secretary of State has hitherto wholly neglected and refused.

XVII. And that your petitioner is without redress by the ordinary legal methods, and has no other remedy except the interposition of this honorable court by the writ of mandamus.

XVIII. Therefore your petitioner prays that this honorable court may issue the writ of mandamus commanding the said Frederick T. Frelinghuysen, as said Secretary of State, to pay to your petitioner the money so demanded of him by your petitioner as aforesaid, and as by law he is bound to do; and your petitioner as *on* duty bound will ever pray, &c.

LA ABRA SILVER MINING CO.
A. H. GIBBES, *Pres'd't.*

FRED. P. STANTON,
SHELLABERGER AND WILSON,
T. W. BARTLEY,
Att'ys for Petitioner.

15 STATE OF NEW YORK,
City & County of New York, ss:

Alfred H. Gibbes, being duly sworn, says that he is the president of La Abra Silver Mining Co., the corporation named in the foregoing petition, and whose name is subscribed thereto by him as said president, and knows the contents of said petition, and that all and singular the matters and facts stated and contained in said petition are true to the best of his knowledge, information, and belief.

A. H. GIBBES.

Subscribed and sworn to before me this 20th day of November, A. D. 1882.

J. P. BALDWIN,
Notary Public in and for said City & County.

16 EXHIBIT A.

LA ABRA SILVER MINING COMPANY
vs.
MEXICO. } No. 489.

Decision of the umpire.

With reference to the case of La Abra Silver Mining Company vs. Mexico, No. 489, the umpire is fully satisfied, and cannot doubt that the company is entitled to be considered a corporation or company of citizens of the United States, in accordance with the terms of the convention of July 4th, 1868, having been duly chartered in conformity with the laws of the State of New York.

He is also of opinion that the enterprise upon which the claimants entered of purchasing, denouncing, and working certain mines in the State of Durango, in Mexico, was a serious and honest business transaction on their part, and that there was nothing rash, deceitful, or fraudulent in it, but that it was engaged in with the sole intention of carrying out legitimate mining operations.

17 There is no doubt that the Mexican Government was very desirous of attracting foreigners to the Republic and of inducing them to bring capital into it and raising up industrial establishments of all kinds. With this view it issued proclamations encouraging the emigration of foreigners, and promising them certain advantages and full protection. It cannot be denied that the claimants were justified in placing confidence in these promises. They complain, however, that the local authorities of the district in which their mines and works connected with them were situated did not fulfill the engagements entered into by their Government, but, on the contrary, behaved towards them in an unfriendly and hostile manner.

The ground of their claim is that these hostilities were carried to such an extent that they were finally compelled to abandon their mines and works and to leave the Republic.

18 The evidence on the part of the claimants is, in the umpire's opinion, of great weight; the witnesses are, for the most part, highly respectable and men of intelligence, and their testimony bears the impress of truth.

Notwithstanding what is stated to the contrary by the witnesses produced by the defence, the umpire is constrained to believe that the local authorities at Tayoltita and San Dimas, far from affording to the claimants that protection and assistance which had been promised them by the Mexican Government, and to which they were entitled by treaty, not only themselves showed a spirit of bitter hostility to the company, but encouraged their countrymen, who were employed by the claimants, in similar behavior, and even frightened them into refusing to work for their American employers.

The conduct of these authorities was such, and the incessant annoyance of and interference with the claimant was so vexatious and unjustifiable, that the umpire is not surprised that they considered it useless to attempt

19 to carry on their operations, and that for this reason, as well as from the well-grounded fear that their lives were in danger, they resolved to abandon the enterprise. These facts are not, in the umpire's

opinion, at all refuted, or even weakened, by the evidence submitted by the defence; on the contrary, he believes that the local authorities were determined to drive the claimants out of the country.

It appears that the superintendent of the mines took such steps as he could to obtain protection from these authorities, and finding his efforts in vain he appealed, through a lawyer of high character, to the highest authorities in the State, who declined to interfe*ar* in the matter.

To suppose that when so determined a spirit of hostility on the part of the local authorities, one of whom was the Gefe Politico, who wielded great power, and so much indifference by the State government, were displayed towards the claimants, it would be of any avail to appeal to the courts of justice would be puerile.

In short, the umpire does not see what else, in presence of such
20 opposition to their efforts, the claimants could do but abandon the enterprise.

The umpire is of opinion that the Mexican Government, which, with a spirit of liberality which does it honor, *and* encouraged all foreigners to bring their capital into the country, is bound to compensate the claimants for the losses which they suffered through the misconduct of the local authorities.

What the amount of this compensation should be it is very difficult to decide.

The umpire is of opinion that the claimants should be reimbursed the amount of their expenditures, and also the value of the ores extracted which they were forced to abandon, with interest upon both these sums.

He cannot consent to make any award on account of prospective gains nor on account of the so-called value of the mines.

Mining is proverbially the most uncertain of undertakings. Mines of the very best reputation and character suddenly come to an end, either
21 from the exhaustion of the veins, or from flooding, or from some of the innumerable difficulties which cross the miner's path. A certain interest upon the money invested is a much surer compensation than prospective gains. The latter are in fact the interest upon the sums invested; they may be greater or less, or none at all, and there may even be great losses of capital. To award both interest and prospective gains would be to award the same thing twice over. The socalled value of the mine must depend upon the prospective gains. It may be great, small, or nothing, and may be but a mere snare to lead one on to utter ruin. It is, in the opinion of the umpire, equally inadmissible that the Mexican Government can be called upon to pay a value the amount of which, even approximately, it is impossible to decide. A moderate interest on the amount invested in the business, and upon the amount of the ores reduced, and of those extracted and deposited at the reduction work, is a further compensation which, in the opinion of the umpire, that Government ought to pay.

22 The evidence of George C. Collins with regard to the amount invested is clear and straightforward. He states it from subscriptions and sales of stocks to be..... $235,000 00
Lent and advanced..... 64,291 06
Due for rent, expenses, salaries, law expenses, &c..... 42,500 00

341,791 00

Any so-called "forced loans" and contributions must have been paid out of this amount. To charge them, therefore, separately is to make the same charge twice over. The umpire takes occasion, however, here to observe that a forced contribution exacted upon a train of goods, the property of the company, in transit from a seaport or elsewhere to the mines, is not in the nature of a forced loan. The latter should be recovered by the proper authorities at the headquarters of the company, and should be in the same proportion as that imposed upon all the inhabitance of the country. The former is an arbitrary exaction which is frequently much more prejudicial than the actual money loss, on account of the detension and
23 abstraction of goods without which the mining operations cannot proceed.

To the above-mentioned amount of $341,791.06 should be added 17,000.00, which is shown to have been the amount derived from reduced ores.

The umpire is satisfied from the reputable evidence produced that a large quantity of valuable ore had been extracted from the mines and deposited at the compan*ie*'s mill, and that it was there when the superintendent was compelled by the conduct of the local authorities to abandon the mines and cease working them but the umpire is of opinion that there is not sufficient proof, nor indeed such proofs as might have been produced, that the number of tons stated by the various witnesses were actually at the mill or at the mines at the time of the abandonment. In so well regulated a business as the umpire believes that it really was he cannot doubt that books would have been kept in which the daily extrac-
24 tion of ores would have been regularly noted down, and that periodical reports would have been made to the company at New York. Neither book nor reports have been produced, nor has any reason been given for their non-production. The idea formed, even by persons intelligent in the matter, of the quantity of a mass of ore must necessarily be vague and uncertain, and that of its actual average still more so. Still the umpire is strongly of the opinion that the claimants are entitled to an award upon this portion of the claim.

He will put it at $100,000. It is possible that this is much less than the real value of the ores; but in the absence of sufficient documentary proof, and considering the fact that the expences of reduction are great and sometimes even much *better* than is anticipated, he does not think that he would be justified in making a higher award.

Neither should interest be allowed on this amount so soon as on the others, for the reduction of the ores would have taken time, say a year.
25 It is not shown that the company had received any dividends before the period of the forced abandonment of the mines, about March 20th, 1868. Neither ought interest to be awarded before that date.

The umpire therefore awards that there be paid by the Mexican Government on account of the above-mentioned claim the sum of three hundred and fifty-eight thousand seven hundred and ninety-one Mexican gold dollars and six cents ($358,791.06), with an annual interest of six per cent. from March 20th, 1868, to the date of the final award, and further the sum of one hundred thousand Mexican gold dollars ($100,000), with the same interest from March 20th, 1869, to the said date of the final award.

Washington, December 27, 1875.

(Signed) EDW'D THORNTON.

26 *Rule to show cause.*

In the supreme court of the District of Columbia, this 22nd day of November, 1882.

THE UNITED STATES EX REL. LA ABRA SILVER Mining Company
vs.
FREDERICK T. FRELINGHUYSEN, SECRETARY of State.
At law. No. 24055.

On reading the petition for the writ of mandamus in the above-entitled cause, and upon considering the same, it is, this 22d day of November, 1882, ordered that the defendant show cause on the 29th day of November, 1882, at 10 o'clock a. m., before the court in general term, why the said writ of mandamus should not issue as prayed; and that a copy of this order be served on the defendant on or before the 25th day of November, 1882.

By the court:

MACARTHUR, *Justice.*

Acknowledgment of service.

Service of this writ, with copy of petitions, writ, and order, accepted this 23rd of Nov., 1882.

THE SECRETARY OF STATE,
By HENRY O'CONNOR,
Dep't of State, Examiner of Claims.

27 *Return of marshal.*

Served copy of this rule and petition on Fred'k T. Frelinghuysen, Secretary of State, November 23, 1882.

C. E. HENRY, *U. S. Marshal.*

28 *Demurrer of Sec'y of State.*

In the supreme court of the District of Columbia, November 29th, 1882.

THE UNITED STATES EX REL. LA ABRA SILVER Mining Company
vs.
FREDERICK T. FRELINGHUYSEN, SECRETARY of State.
At law. No. 24055.

The demurrer of Frederick T. Frelinghuysen, Secretary of State, &c.

This defendant, by protestation, &c., &c., doth demurr to the petition in the cause above entitled, and for cause of demurrer sheweth that the said petitioner hath not, as appears by his said petition, made out any title to the relief thereby prayed.

Wherefore, &c., he prays to be hence dismissed with his reasonable costs in this behalf sustained.

BREWSTER,
Attorney-General.

29 *Joinder in demurrer.*

In the supreme court of the District of Columbia, in general term, Dec. 13th, 1882.

THE UNITED STATES EX REL. LA ABRA SILVER Mining Co. *vs.* FRED'K T. FRELINGHUYSEN, SECRETARY OF State.	Petition for mandamus.

The relator joins in the demurrer filed by the Attorney-General of the United States.

FRED. P. STANTON,
Att'y for the Relator.

30 *Judgment on demurrer.*

In the supreme court of the District of Columbia in general term.

THE UNITED STATES ON THE RELATION OF La Abra Silver Mining Company *against* FREDERICK T. FRELINGHUYSEN, SECRETARY of State of the United States.	No. 24055.

This cause came on this 13th day of December, A. D. 1882, to be heard by the said court in general term upon the petition of the complainant upon the relation of the relator, La Abra Silver Mining Company, the demurrer thereto by the said Frederick T. Frelinghuysen, and upon the joinder in demurrer by the said complainant, and was by said parties submitted to the said court upon said petition and exhibits and demurrer, and was considered by the *the* court.

And thereupon it is by the court here ordered & adjudged that the said demurrer be, and the same is, sustained, and the said petitioner is dismissed and the rule herein and heretofore issued is discharged.

To which ruling and judgment the said complainant and relator excepts.

By order of the court.

D. K. CARTTER, *Ch'f Just.*

31 *Penalty of bond.*

Supreme court of the District of Columbia, in general term, December 20, 1882.

THE UNITED STATES ON RELATION OF La Abra Silver Mining Company *vs.* FREDERICK T. FRELINGHUYSEN, SECRETARY of State of the United States.	At law. No. 24055.

On the motion of Mr. Stanton, of counsel for the relator, the penalty of

his bond for the prosecution of a writ of error to the judgment of the court in this case is fixed at one hundred dollars.

32 In the supreme court of the District of Columbia, the 22' day of December, 1882.

THE UNITED STATES EX RELATIONE LA ABRA Silver Mining Company, plaintiff,
vs.
FREDERICK T. FRELINGHUYSEN, DEFENDANT, Secretary of State.
} No. . In error.

Know all men by these presents that we, Alfred H. Gibbes, of Newark, New Jersey, doing business in the city of New York, merchant, and Sumner Stow Ely, of the city of New York, lawyer, are bound unto the above-named Frederick T. Frelinghuysen, Secretary of State of the United States, in the sum of one hundred dollars, to be paid to the said defendant, his executors or administrators, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals and dated this 22d day of December, 1882.

Whereas the above-named plaintiff has prosecuted its writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia.

Now, therefore, the condition of this obligation is, that if the above-named plaintiff shall prosecute its said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

A. H. GIBBES. [SEAL.]
SUMNER STOW ELY. [SEAL.]

Sealed and delivered in presence of—

J. G. BALDWIN,
Notary in & for City & County of New York.

STATE OF NEW YORK,
City and County of New York, ss:

33 On this 22d day of December, A. D. 1882, before me, a notary public for said city and county, personally came Alfred H. Gibbes and Sumner Stow Ely, to me known, and known to me to be the same persons described in and who executed the within and foregoing bond or instrument, and they severally acknowledged to me that they executed the same.

[NOTARIAL SEAL.] J. G. BALDWIN,
Notary Public in & for the City & County of New York.

STATE OF NEW YORK,
City and County of New York, ss:

I, William A. Butler, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that J. G. Baldwin, whose name is sub-

scribed to the certificate of the proof or acknowledgment of the annexed instrument and thereon written was, at the time of taking such proof and acknowledgment, a notary public in and for the city and county of New York, dwelling in the said city, commissioned and sworn and duly authorized to take the same; and further, that I am well acquainted with the handwriting of such notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine. I further certify that said instrument is executed and acknowledged according to the law of the State of New York.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 22d day of Dec., 1882.

[SEAL OF NEW YORK.] WM. A. BUTLER, *Clerk.*

Approved this 23d day of Dec., A. D. 1882.

D. K. CARTTER, *Ch'f Just.*

34 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, greeting:

Because in the record and proceedings as also in the rendition of a judgment in a plea which is in the said court before you, between the United States ex relatione La Abra Silver Mining Company, plaintiff, and Frederick T. Frelinghuysen, Secretary of State, defendant, a manifest rror hath happened to the great damage of the said plaintiff, as by itse complaint appears, and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the United States, this 23rd day of December, in the year of our Lord 1882, and of the Independence of the United States the 107th.

[SEAL.] R. J. MEIGS, *Clerk,*
By J. R. YOUNG, *Ass't Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To Frederick T. Frelinghuysen, Secretary of State:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein the United States ex relatione La Abra Silver Mining Company is plaintiff, and you are defendant, to show cause, if any there be, why the judgment in the said

writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

1882, Dec. 23, service acknowledged.

S. F. PHILLIPS,
Sol'r Gen'l.

35 *Authentication of record.—Clerk's certificate.*

Clerk's office, supreme court of the District of Columbia.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 23rd day of December, 1882.

[SEAL.] R. J. MEIGS, *Clerk,*
By R. J. MEIGS, No. 3, *Assistant Clerk.*

Justice's certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 23rd day of December, 1882.

D. K. CARTTER, SEAL.]
Chief Justice.

Clerk's certificate to justice's official character.

I, R. J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was at the time of signing and attesting the same chief justice of said court, duly commissioned and qualified.

Witness my hand and seal of said court this 23d day of December, 1882.

[SEAL.] R. J. MEIGS, *Clerk,*
By R. J. MEIGS, No. 3, *Assistant Clerk.*

(Indorsement on cover:) No. 995. The United States ex rel. The La Abra Silver Mining Company, plaintiff in error, vs. Frederick T. Frelinghuysen, Secretary of State. Dist. of Columbia supreme court. Filed October 1st, 1883.

110-63

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 995.

THE UNITED STATES EX REL. LA ABRA SILVER MINING COMPANY,

Plaintiff in Error,

vs.

FREDERICK T. FRELINGHUYSEN,

Secretary of State.

BRIEF FOR THE PLAINTIFF IN ERROR.

FREDERICK P. STANTON,
SHELLABARGER & WILSON,
Attorneys and of Counsel for Plaintiff in Error.

Evening Post Job Printing Office, N. Y.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1883.

THE UNITED STATES EX REL. La Abra Silver Mining Company, Plaintiff in Error, vs. FRED'K T. FRELINGHUYSEN, Secretary of State.	No. 995.

BRIEF FOR THE PLAINTIFF IN ERROR.

This writ of error to the Supreme Court of the District of Columbia brings up a petition for a mandamus against the defendant, as Secretary of State, to compel him to pay to the relator money received from Mexico on an award made in favor of the relator by the umpire of the joint commission established in pursuance of the treaty of July 4, 1868, between the United States and Mexico.

The defendant demurred to the petition in the court below, and the case was there submitted without argument

in order to have a prompt decision in this court. The demurrer was sustained and the petition dismissed.

This judgment is here assigned as error.

STATEMENT OF THE CASE.

The issue on the demurrer presents the questions of law relieved of all uncertainty or complication as to the facts. These must be taken as stated in the petition, subject to such interpretation of the laws and treaties involved as may be given by this court.

There is no dispute as to the award; nor as to the amount of money now in the hands of the secretary to be paid on it. The relator claims this as *its* money, the legal right to which is vested in the relator by virtue of the award and the payment by Mexico in satisfaction of it *pro tanto*.

The treaty was made for the express purpose of adjusting the individual claims of citizens of each government against the other. Each claimant prosecuted his own case, at his own expense; and, although the litigation was carried on by agents of the respective governments, no case was presented, no document or proof of any kind was filed, except as prepared and submitted by the individual claimants and their private attorneys. Each case was, in fact, in all respects, an individual suit, except that it was prosecuted through the instrumentality of the United States for the benefit of the claimant. The petition alleges that the relator in this case, "at much expense and trouble," prosecuted its claim, and that numerous witnesses were examined on both sides.

The first article of the treaty provides for the submission "of all claims on the part of corporations, companies or private individuals" of each government against the other to a commission of two persons, and for the selection of an umpire in case of disagreement of these.

The second article provides for the investigation of the cases by the commissioners, and, in case of their disagreement, by the umpire, and expressly declares that the umpire "shall decide thereupon finally and without appeal." This article concludes with this declaration: "The President of the United States of America and the President of the Republic of Mexico hereby solemnly and sincerely engage to consider the decision of the commissioners conjointly, or of the umpire, as the case may be, as absolutely final and conclusive upon each claim decided upon by them or him, respectively, and to give full effect to such decisions, without any objection, evasion or delay whatsoever."

The fourth article provides for paying the awards by annual installments of $300,000.

The 5th article is in these words: "The high contracting parties agree to consider the result of the proceedings of this commission as a full, perfect, and final settlement of every claim upon either government, arising out of any transaction of a date prior to the exchange of ratifications of the present convention; and further engage that every such claim, whether or not the same may have been presented to the notice of, made, preferred, or laid before the said commission, shall, from and after the conclusion of the proceedings of the said commission, be considered and treated as finally settled, barred, and thenceforth inadmissible."

The award of the umpire in this case is filed with the petition as Exhibit A, page 6, of the transcript.

ARGUMENT.

First.

The commission established by this treaty was a great international tribunal, whose judgments were to be absolutely conclusive and without appeal. It would be impossible to

find any words either in the English or Spanish language, which could be made to add anything to the finality and binding obligation of the awards rendered by this commission. The judgments of the Supreme Court of the United States are not by any law made more conclusive, nor enforced by any higher sanction than that solemn pledge of national faith which guards the validity of these decisions.

The treaty of 1819 between the United States and Spain contained no such words as the treaty in question; and yet in the case of Commegys *v.* Vasse, 1 Pet., 212, this court said: "The object of the treaty was to invest the commissioners with full power and authority to receive, examine, and decide upon the amount and validity of the asserted claims upon Spain for damages and injuries. Their decision within the scope of this authority is conclusive and final. If they pronounce the claim valid or invalid, if they ascertain the amount, their award in the premises is not re-examinable, the parties must abide by it as the decree of a competent tribunal of exclusive jurisdiction. A rejected claim cannot be brought again under review in any judicial tribunal; an amount once fixed is a final ascertainment of the damages or injury. This is the obvious purport of the language of the treaty."

To the same effect are these cases:

Clark *v.* Clark, 17 How., 321.
Judson *v.* Corcoran, 17 How, 612.
Phelps *v.* McDonald, 99 U. S., 298.
Erwin *v.* U. S., 97 U. S., 392.

The principle established seems to be that the awards of such international tribunals are equivalent to judgments of courts of competent jurisdiction, and become vested property in the claimant. In Judson *v.* Corcoran the court says, "It (the award) makes a legal title to the person recognized as the owner of the claim; and if he also has equal equity, his legal title cannot be disturbed."

In Commegys *v.* Vasse, 1 Pet., 215, this court quoting from Mr. Chief Justice Kent, say, "If France should at any future period make compensation for the capture and condemnation in question, the Government of the United

States, to whom the compensation would, in the first instance, be payable, would become trustee for the party having the equitable title to the reimbursement."

In the Gibbs case 13, Opinions 32, 34, the Attorney-General (Hoar) said, in reference to the payment of awards by New Granada, "Such payment to our Government was, of course, intended to be in trust for the parties whose claim should be satisfied."

And, in fact, the law of June 18, 1878, referred to in the petition, is virtually a legislative approval of the principle established by this court in the cases quoted. It requires the Secretary of State to receive the money from Mexico as the several installments shall be paid, and distribute it among the claimants in proportion to the amount of their several awards. This is a plain acknowledgment that the money belongs to the owners of the claims adjudicated. It is not the money of the United States, and does not go into the Treasury at all. Mexico pays the money in satisfaction of the awards; the Secretary receives it for that purpose, and the law directs him to pay it to the claimants.

If there were no conditions in the Act of 1878—if that law stood alone, with a simple duty imposed on the Secretary to receive the money and pay it to the claimants, there could be no question in the case. It is hardly conceivable that the Secretary would be allowed to withhold the money in defiance of the law which commands him to pay it, and that the claimants would have no remedy against him. A mandamus would lie to compel him to distribute the fund as directed by law; for that would be a simple ministerial duty, allowing no discretion beyond that of making the necessary arithmetical computations. All the judicial discretion was confided to and exhausted by the joint American and Mexican commission in making the award. There would be nothing further to be done except to make the payment, which is not in any sense a political function or a matter of executive discretion.

Second.

THE ACT OF JUNE 18, 1878, AND ITS BEARING ON THIS CASE.

The first section of the Act directs the Secretary to receive the money from Mexico and distribute it in due proportion among the claimants, with the exceptions stated. The relator owed nothing to the government, so that the only question made in this case is upon the 5th section of the Act, which is quoted in full in the Solicitor-General's brief, and need not be here repeated. In substance it enacts that it shall be lawful for the President to withhold the money in this and one other case, if on investigation he shall be of opinion that the award ought to be opened and a new trial had.

We insist that this provision of the law is inoperative at the present time, and leaves the first section of the act in full force, just as if the fifth section had never been enacted. This we maintain on two grounds;

1st. Because the fifth section is void in itself by force of its own terms. We do not argue that a treaty, which is a law of the land, may not be repealed by an Act of Congress, which is also a law. But when a law has been executed, and private interests acquired under it, the things which have been legally done cannot be undone—rights acquired under it cannot be taken away. No Act of Congress could take away from the relator his right of property in the award, unless, under our Constitutional provision, by making just compensation for it. But the law does not propose to take this award or to abolish it, but only, in a certain contingency, to open it and have it retried. And this, of all other things, is precisely that one which Congress cannot do.

Not only is this beyond the power of Congress; it is equally beyond the power of both the United States and Mexico. The joint commission was established by the two governments, as declared in the treaty of July 4, 1868. If

only the two powers were concerned, they might abolish the treaty and all that was done under it. But individual citizens are concerned in the awards, and have acquired rights under them, and neither of the powers alone, nor both of them together, can destroy or take away those rights.

In Fletcher *vs.* Peck, 6 Cr. 87, Chief Justice Marshall says: "If an act be done under a law a succeeding Legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made. Those conveyances have vested legal estates, and if those estates may be seized by sovereign authority, still that they originally vested is a fact. When a law is in the nature of a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights, and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of any individual in the community."

While a treaty is a law for us, it is also a contract with the other government. U. S. *vs.* Arredondo, 6 Pet., 733. But in this case it is not only a contract between the two governments, but also with the individual citizens who have submitted their claims to the joint commission, and expended their means in prosecuting them to a final award. To disturb these awards is to violate this contract.

In Woodruff *vs.* Trapnall, 10 How., 190, it was held that the holders of the bank notes were parties to the contract involved in the legislative act chartering the bank, though the individuals were not actually named in the act, and that the State had no power to invalidate that contract. Here the treaty designates the claimants, and it is made for their very benefit.

A new trial cannot be granted by legislative authority.

Morrill *vs.* Sherburne, 1 N. H., 199.
Bates *vs.* Kimball, 2 Chipman (Vt.), 77.
Lewis *vs.* Webb, 3 Greenleaf (Me.), 326.
De Chastellux *vs.* Fairchild, 15 Pa., 18.

Cooley (Constitutional Limitations, 492) says: "Special courts cannot be created for trial of the rights and obligations of particular parties; and those cases in which leg-

islative acts granting new trials or other special relief in judicial proceedings, while they have been regarded as usurpations of the judicial authority, have also been considered obnoxious to the objection that they undertook to suspend a general law in special cases."

Congress cannot annul a judgment.

St. of Pennsylvania *vs.* Wheeling B'dge Co., 18 How., 431.

Dash *v.* Van Kleeck, 7 John (N. Y.), 490.

We are aware that some of the State Legislatures do exercise judicial functions, and sometimes pass laws divesting vested rights; and also that this court has held such proceedings valid, because they are neither *ex post facto* laws nor violations of contract, which alone, under the Federal Constitution, would authorize this court to pronounce them void. But when the court has occasion to consider the powers of the Federal Government itself, it holds this language, in Kelbourn *vs.* Thompson, 103 U. S., 192:

"The Constitution declares that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. If what we have said of the division of the powers among the three departments be sound, this is equivalent to a declaration that no judicial power is vested in the Congress, or either branch of it, save in the cases specifically enumerated to which we have referred.

"If the investigation which the committee was directed to make was judicial in its character, and could only be properly and successfuly made by a court of justice, and if it related to a matter wherein relief or redress could be had only by a judicial proceeding, we do not, after what has been said, deem it necessary to discuss the proposition that the power attempted to be exercised was one confided by the Constitution to the judicial and not to the legislative department of the government. We think it equally clear that the power asserted is judicial and not legislative."

Whether a new trial ought to be allowed in case of a judgment declared to be final and conclusive, is certainly a judicial question; and the power to grant such a retrial could only be judicial in its nature. This judicial power

Congress does not possess, and cannot exercise without usurpation.

We have a final judgment in this case rendered against Mexico, by a tribunal lawfully established. If our Government cannot rightfully disturb that award, what aid can Mexico give to this end, when she is the party interested—the defendant in the judgment? When and where has it ever been admitted that a party may become the judge in his own case, either to arrest a judgment, or to establish another tribunal to retry it?

In the case of the United States *v.* Klein, 13 Wall., 146, where the question was upon the validity of a law directing the Supreme Court to dismiss from the Court of Claims in certain cases, this court said:

"We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimant. Can we do so without allowing one party to the controversy to decide in its own favor? Can we do so without allowing that the Legislature may prescribe rules of decision to the judicial department of the Government in cases pending before it?"

If our Government could not decide in its own favor in that case, why should Mexico be allowed to do so in the present controversy? The plan proposed to get rid of this award involves a treble violation of constitutional principle; our own executive will assume judicial functions which he does not possess, and the Mexican Government will do the same, with the additional wrong of deciding its own case "in its own favor."

On the next page of the opinion in Klein's case (p. 147), the court strongly repudiates the idea that either Congress or the President can exercise any judicial functions whatever.

Frauds of a certain character may be set up in a Court of Equity, even to impeach a judgment of this court itself. Such frauds are well defined in the case of the United States *v.* Throckmorton, 8 Otto, 61. Mexico might go into our courts and annul an award made by this joint commission on proof of such a fraud as the court in that case declares sufficient to invalidate a judgment. But this we submit is the only remedy—certainly the only

remedy known to our laws. Let her pursue this remedy, instead of seeking to settle judicial questions by legislative or executive authority. In its very nature, the question of a new trial is judicial, and cannot be constitutionally decided, either by Congress or by the treaty-making power of our Government.

The Solicitor-General suggests, rather than argues, that without the law of 1878, the claimants in these cases would have had no remedy—the awards could not have been paid. This is a mistake. Money paid under similar treaties have been distributed without a law of Congress. In this case, the treaty itself obligates the President of the United States and the President of Mexico to give effect to the decisions of the Commission, "without any objection, evasion or delay whatsoever." The money being paid by Mexico to the United States, this provision of the treaty, so solemnly worded, would seem to impose on the President the duty of distributing the money thus received.

But Congress, recognizing the fact that the Government, in receiving the money paid by Mexico on these awards, was acting only as trustee for the claimants, by the law of 1878, ordered the Secretary to distribute it accordingly. Undoubtedly, the Government might have arbitrarily failed to pass such a law; or perhaps it might have passed a law still more arbitrary, to pay some and withhold others. But this it has not done. It has only authorized the President to withhold the money *if he thinks this case ought to be retried.* It is *this condition of withholding the money* which we stigmatize as beyond the power of Congress, and therefore illegal and void. And if this condition fails, then the first section of the law stands unaffected by it, and the Secretary has a plain ministerial duty to perform, by paying this money to the parties who are entitled to receive it.

2d. Thus we deny the validity of the 5th section of the law; but we further say that, even admitting its validity, the authority by it conferred on the President has been exercised and exhausted; the section itself has become *functus officio.*

The President did make the investigation invited by this provision of the law; and we, though protesting against it, as we do now, attended and participated in the investigation, as did also Mexico by her attorneys. The result was communicated to Congress in the message referred to in the petition.

This message speaks for itself. The petition alleges that "Congress, having adjourned on the 4th March, 1881, without taking action in the matter, the President held the said award as no longer open to reconsideration, and the Secretary of State accordingly thereafter paid upon your petitioner's said award" its proper proportion of the instalments of 1880 and 1881.

The last instalment was paid by the new Administration; so that the decision of President Hayes on the 5th section of the act was accepted as final by President Garfield and the money was paid by Mr. Secretary Blaine. Thus two Administrations have concurred in this decision, and five instalments, amounting to nearly one-half the award, have been actually paid.

The Solicitor-General, in his brief, seems to find fault with what he calls the "notification" by President Hayes to Congress, in the letter of Mr. Evarts, that "unless Congress shall now make this disposition of the matter," &c., "it would appear to be the duty of the Executive to accept these awards as no longer open to reconsideration and to proceed with the payment of the same." He probably overlooked the fact that President Arthur and Mr. Frelinghuysen on the 25th May, 1882, in a message to Congress on the Venezuela awards, did precisely the same thing by giving a similar "notification" in even more peremptory words. Ex. Doc. No. 208, 47th Congress, 1st session. The President said: "In case neither House takes action upon it during the present Congress, I shall feel it my duty to direct that this prolonged discussion be definitely terminated by recognizing the absolute validity of all the awards." This notification was in pursuance of the advice of Secretary Frelinghuysen, in his letter, which President Arthur transmitted with his message, as President Hayes did the letter of Mr. Evarts.

But it is not the "notification" that we consider import-

ant in this case; it is the actual payment of the money afterwards, which establishes beyond all doubt the decision of the President. He would not have paid the money if he had not decided that the awards were no longer open to reconsideration. He had already declared his opinion, "that neither the principles of public law nor considerations of justice or equity require or permit, as between the United States and Mexico, that the awards in these cases should be opened and the cases retried before a new international tribunal, or under any new convention or negotiation respecting the same between the United States and Mexico."

In the case of P. and T. R. R. Co. *vs.* Stimpson, 14 Pet., 448, this court said: "Where proofs are to be laid before a public officer, and he is to do an act on being satisfied of certain facts, his doing the act is *prima facie* evidence that the proceeding was regular, and the sufficiency of the proofs cannot be controverted or re-examined before any other tribunal if the law has made him the proper judge."

Two Administrations, those of Hayes and Garfied, after full investigation by the former, paid the instalments in full as they were received. This is absolute proof that the question under the 5th section of the law had been finally settled. Payments were made of large sums by those eminent Secretaries Evarts and Blaine, and no questions were reserved. As the petition in this case pointedly alleges, "the President held the said award as no longer open to consideration."

If President Arthur can take up this case and reconsider it, reversing the decision of two predecessors; if the discretion still remains in him, and has not been exercised and exhausted, then any future President may review President Arthur's decision and keep the question open to the end. This would be a most unreasonable position, productive of infinite mischief if applied to all similar questions.

But we think this point is well settled by numerous decisions of this court. The President, by the 5th section of the act, was made a special tribunal, with *quasi* judicial functions, to determine the question submitted to his investigation. Having decided it, his action is final and not subject to revision by any authority whatever. It is

not merely the question of "an incumbent reviewing his predecessor's decision," which was settled in the case of U. S. *v.* The Bank of Metropolis, 15 Pet., 401, and which has been uniformly held in the same way, by the unvarying practice of the Government, and in numerous opinions of Attorneys-General; but this case presents also a higher question, namely, the one we have already stated as to the final and conclusive character of the judgment of a special tribunal, from whose decision no appeal is given. The cases on this point are so numerous and varied as to circumstances and the officers clothed with such authority, that it is difficult to make a selection. We present the following:

Kendall *v.* U. S., 12 Peters, 614.
R. R. *v.* Stimpson, 14 P., 448.
Martin *v.* Mott, 12 Wheat., 19.
Reichart *v.* Felps, 6 Wall., 83.
U. S. *v.* Feweira, 13 How., 40.
U. S. *v.* Speed, 8 Wall., 83.
Marquis *v.* Furbee, 11 Otto, 476.
U. S. *v.* Arredondo, 6 P., 729 30.

The case of Kendall *v* U. S. is strongly in point—almost exactly in all respects like the present case. The Solicitor of the Treasury was constituted the special tribunal to adjust the accounts of Stockton *v.* Stokes; and the Postmaster-General was required to give them credit for whatever the Solicitor should award.

In our case the Secretary is required to pay, unless the President should find a certain condition of things, which he did not find, but expressly denied. The only difference in the two cases, is that in the former the act of the Postmaster-General was to be done upon the *positive* finding of the Solicitor of the Treasury; while in the latter, the Secretary of State is directed by the law to pay the awards on the *negative* result of the President *not* being of opinion that the cases ought to be opened and retried. In both cases the law makes the ministerial act dependent on the decision of an officer who is invested with a *quasi* judicial discretion. The condition having been fulfilled, the ministerial duty results as a necessary consequence.

Reichart *v.* Felps is also a strong case, because, in it, Congress had undertaken to appoint a new Commission to retry the titles which had been awarded by Governor St. Clair, Governor of the North-West Territory, under a previous law, which authorized him to examine the titles and lay off the lands, to the claimants. The new Commission reversed Governor St. Clair's action, but this court held their proceedings to be void, and confirmed that of the Governor, as the decision of a special tribunal, which even Congress could not overrule or cause to be re-examined.

In U. S. *v.* Arredondo, at p. 729–30 of 6 Peters, the following principle is announced by this court: "It is a universal principle that where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his discretion, the acts so done are binding as to the subject-matter * * * The only questions which can arise between the individual claiming a right under the act done, and the public or any person denying its validity, are power in the officer and fraud in the party. All other questions are settled by the decision made on the act done, by the tribunal or officer, whether executive, legislative, judicial or special, unless an appeal is provided for, or other revision by some appellate or supervisory tribunal is prescribed by law.

It is very plain that this principle, so broadly stated in this paragraph, and so firmly established by the cases we have quoted, and others which we might quote, necessarily negatives the idea that a successor in office of one who thus exercises the functions of a special tribunal can afterwards review, reconsider and reverse the decision of his predecessor given under such a special authority. The instances in which a successor can for any cause review the acts of his predecessor in office, have relation to the regular duties of that office, and not to special cases, arising out of an emergency, and committed by law to the officer, as a special tribunal, for speedy decision and prompt action.

In this case a large sum of money, in the hands of the Secretary, paid over by Mexico for the express purpose of satisfying the claimant's award, was awaiting the President's action. So soon as the President had fully decided, and after appealing to Congress for additional authority, which

Congress failed to give, the Secretary paid the money, as he was required by law to do. We respectfully submit that it is wholly unreasonable, absurd, and, in fact, impossible, to maintain that the successor of President Hayes and of President Garfield has the right or the power to review and reverse this decision. It matters not that the money is payable by installments. What the President was required to do has been done, and there is an end of his authority in that business. The principle applicable to one installment is applicable to all. Five installments out of thirteen have been paid. Two more are now in the hands of the Secretary of State, paid by Mexico to meet this award. The money is not the money of the United States, and is not in the Treasury. It is in the hands of the Secretary, who is commanded by the law to pay it over to the party to whom it belongs.

If the 5th section of the law is valid, and has not been executed and exhausted—if President Arthur can take up this case and reconsider it—if the special authority still continues, so that any future President, at the payment of other installments, may review and reverse President Arthur's opinion—then we must admit that we cannot maintain our petition; for we know the doctrine is firmly settled, that the executive, political, or *quasi* judicial discretion of the President or his Cabinet officers, when they are plainly clothed with it, cannot be controlled by the courts.

But we maintain that the discretion is wholly gone, and that the 1st section of the Act of 1878 stands now as if the 5th section had never been a part of the law. The court will not fail to observe that the 1st section *requires* the Secretary, "whenever, and as often as any instalment shall have been paid by the Mexican Republic on account of said awards, to distribute the moneys so received" among those entitled, "*except as in this act otherwise limited or provided.*" The only limitation affecting this case was that contained in the 5th section, which was, that if, upon investigation, the President "shall be of opinion that the honor of the United States, the principles of public law, or considerations of justice and equity require that the awards * * * * should be reopened and retried, it shall be lawful for him

to withhold payment of said awards." This is the sum and substance of the limitation in the exact words of the law; for the parts of the sentence omitted in this quotation following the word "until" only refer to the time during which the money may be withheld in case of an opinion in favor of a new trial, and do not at all affect the condition upon which it may be lawful to withhold the money. But the President was of opinion that "neither the principles of public law nor considerations of equity and justice require or permit" the reopening and retrial of the case; that is to say, he decided against such a retrial. Now, as it was declared to be "lawful to withhold the money," only in case the President decided in favor of a new trial, it becomes *unlawful* to withhold it, when he decides the opposite. This conclusion is unavoidable.

Thus we have a law which places money paid by Mexico for the satisfaction of this claim, in the hands of the Secretary, and commands him to distribute it upon a condition, which, having been fulfilled by the President, makes it unlawful for the Secretary to withhold the money; and yet it is insisted that a mandamus will not lie to compel him to do what it is unlawful not to do! If there ever was a case proper for the application of that extraordinary remedy, this would seem to be the very one.

The case is not changed if it be assumed as a fact herein, that Secretary Frelinghuysen withholds the money by the command of President Arthur. The President's command is unlawful, and, therefore, affords no excuse whatever. We need not quote authorities here to prove that such a command affords no protection even to a military or naval officer, whose duty is generally held to be prompt and unquestioning obedience to the orders of the commander-in-chief. Much less will it shield a civil officer, who is himself designated by the law and commanded to do the act which we seek to enforce by mandamus.

Little *v.* Barreme, 2 Cr., 170, is one of the earliest cases involving this question, but it is as decisive as any subsequent one.

The latest utterance of this court on the subject is found

in the case of the United States *v.* Lee, 106 U. S., 220–21, in the following words:

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government from the highest to the lowest, are creatures of the law and are bound to obey it.

"It is the only supreme power in our system of Government, and any man who, by accepting office, participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

"Courts of justice are established not only to decide on the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the Government, and the docket of this court is crowded with controversies of the latter class.

"Shall it be said in the face of all this, and of the acknowledged right of the judiciary to decide, in proper cases, statutes which have been passed by both branches of Congress and approved by the President to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the Government, without lawful authority, without due process of law and without compensation, because the President has ordered it, and his officers are in possession?

"If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well regulated liberty, and the protection of personal rights."

If this view be correct, it would seem to afford a complete answer to the reference made by the Solicitor-General to the case of Mrs. Decatur in 14th Peters, and the other cases quoted by him to the same point.

The distinction is, that in this case the President has exercised the discretion with which he was clothed, and exhausted it, leaving a state of things in which the law commands the act to be done which we seek to enforce. It is to be observed that the discretion under the law was not

conferred upon the secretary. As the officer named in the law, he never had any discretion in the matter. His simple ministerial duty was to pay or withhold, as the President might decide. It is true that in the performance of the ordinary duties of his office, he is the agent of the President, and under his control; and also, under this law, so long as the President had any discretion in the case, up to the time of his final action, the secretary was the agent and instrument of the President. But so soon as the President had exercised and exhausted his discretion, the secretary became the instrument of the law and was bound to obey it.

In the Decatur case the Secretary of the Navy was required to execute two laws which involved complicated questions of construction and action. No one else had authority to unravel the difficulty and prescribe a rule for him. The discretion was conferred on him, and him alone; and the courts had no power to control him in the exercise of that discretion. He was not, as in this case, ordered to pay a specified sum of money, which, in itself, is a simple ministerial act—as much as the entry of a credit, as was required in the case of Kendall. On the contrary, the Secretary of the Navy, in the Decatur case, had to determine whether two pensions or one were allowed, and what emoluments should go with the pay of an officer in estimating the amount, as well as some other grave questions concerning the navy pension fund, of which he was the custodian and the trustee. There is all the difference between the two cases that there is between a complicated question of conflicting laws, and a simple problem of division in arithmetic.

But the secretary says the President has made a treaty with Mexico for the retrial of the two cases named in the fifth section of the Act of 1878, and that it is now pending in the Senate. We are aware that, as our case stands on demurrer, this allegation is not strictly applicable to it. At the same time, we know very well that our claim is resisted by this demurrer, on the ground that the President has the right and the power to make this treaty to include ours as well as the other cases. Therefore we deem it not inappro-

priate to meet this emergency of the argument, as we shall be compelled to meet it in the end at any rate, and as the the whole question comes up legitimately in the other of the two cases.

Mr. Frelinghuysen's treaty was submitted to the first session of the last Congress. It was pending during both sessions; and some time before the adjournment on the 4th March last, it came to a vote and was defeated. One senator changed his vote and entered a motion for a reconsideration; but the question was not again called up, and the adjournment took place without any further action on the subject. Some senators are of opinion that the motion to reconsider fell at the end of the session and that the treaty was thus defeated; others consider that it is still pending. So stands the treaty which is said to be under consideration. But how long may it continue in this condition? Through how many sessions, and how many Congresses, may it drag its slow length along, before the question of our rights under the award will be finally settled? It has already been more than five years since the President was invested with authority to decide the question, and neither House of Congress has taken any action whatever on the subject. We do not know that either House ever will.

But if Congress, or the treaty-making power of our Govment has authority over the subject, perhaps we should be compelled to await the action of those bodies, however long they may delay it. The "comity" of which the Solicitor-General speaks in his brief, as due from the judicial to the legislative branches of the Government, might then, perhaps, properly assert its claim in this court.

It is plain, however, that the fact of the President having made a treaty, and sent it to the Senate for its approval, does not in the least affect the question of the President's authority under the Act of 1878, nor does it impair the force of what was done under that act by the administrations of Hayes and Garfield. The President, for the time being, cannot add to his authority, under the circumstances of this case, by sending a treaty to the Senate. Both the President and the Secretary of State are still bound to execute the law as it exists, and they have no excuse for refusing to do so. The treaty of 1868 is the law, and that de-

clares this award to be *absolutely final and conclusive*," and binds the President, by the most solemn obligations, to carry it into "*full effect*," and that "*without any objection, evasion or delay whatsoever.*"

We have already shown, as we believe conclusively, that the things done under the treaty vesting individual rights, cannot be undone by any authority whatever. The claimants who went before the joint commission were virtual parties to the treaty-contract, and the awards are equivalent to judgments of a final tribunal—judgments which can only be disturbed by judicial authority, such as might be invoked to set aside a judgment, even of this court, as indicated in Throckmorton's case already quoted.

The treaty-making power of this Government can no more transcend the Constitution than the legislative or the Executive. It cannot do an unlawful act—that is, an unconstitutional act. It cannot take private property for public uses without just compensation; nor can it dispense with that "due process of law" which the Constitution guarantees to the citizen for the protection of his rights of person and property. This treaty-making power, consisting of the President and the Senate, has no judicial authority; therefore, it cannot grant a new trial in a case which has been decided by an international tribunal, for this involves a judicial investigation, and the exercise of judicial power.

It is true that the Goverment, when negotiating with foreign powers for the settlement of injuries done to the citizen, acts as the agent of the citizen, with unlimited discretion in the premises, but always under the obligation to protect the citizen against wrong, and secure redress for his grievances, so far as may be possible. It is not chargeable with *laches*, and may make any settlement in its judgment proper, and the citizen is compelled to submit. The treaty made is the law for him, and he must obey it, but at the same time he is entitled to the benefit of it. Rights acquired under it—vested rights—can no more be taken away than any other property he possesses. Such property cannot be taken by

treaty any more than it can by an act of Congress, or by the arbitrary will of the Executive.

In the case of Gibbs, above referred to, an award was made in his favor under a treaty with New Grenada. This award was assailed for fraud. Our Government made a new treaty, and without the consent of Gibbs, submitted his claim to a new commission, which, reversing the decision of the former commission, rejected it. Attorney-General Hoar, in his opinion, held that the first award was binding, and that the proceedings of the new commission were a nullity. The money was afterwards paid to Gibbs by our Government.

The Solicitor-General, in his brief, assumes that the President, in adopting the letter of Mr. Evarts, had decided "adversely" to the claimants, because he thought, while no retrial could be allowed, "these two cases should be further investigated by the United States, to ascertain whether this Government had been made the means of enforcing against a friendly power, claims of our citizens based upon or exaggerated by fraud." But the very fact that Mr. Evarts suggested a domestic tribunal with authority to investigate this question, negatives the idea that he had decided that question himself. He did not decide it. There is not a word in his letter which goes to establish any such decision. He was too good a lawyer and too just a man to found any definite conclusion upon the facts which had been submitted to him by Mexico in the investigation he had made.

The Judiciary Committee of the Senate in its report, which is printed in the Solicitor-General's brief, takes decided ground against any domestic examination of the case, and this opinion was sustained by the Senate.

The report of Mr. S. S. Cox in the House of Representatives in favor of a domestic investigation, also printed in the Solicitor-General's brief, was recalled by a vote of the Committee, and upon motion in the House, the subject was referred back to the Committee, and there it slept without any action until the end of the Congress. Still another Congress has assembled, legislated for its term of two years, and adjourned without taking up the subject.

The Act of 1878 did not contemplate any such domestic investigation; the whole subject was fully disposed of under that law when Mr. Evarts reported and the President decided against a retrial before a new international tribunal.

It is important, in conclusion, to say these few words: When Mr. Evarts undertook to investigate this question, involving the rights of citizens of his country, he called them before him and permitted them to answer her charges with argument, though not with testimony. For several weeks, at intervals, the argument was maintained by Mexico and her attorneys on one side, and by the claimants and their attorneys on the other. The investigation was open and there was a fair hearing.

Mr. Frelinghuysen pursued a different course. If he made any investigation at all, it was secret and one-sided. The claimants and their attorneys knew nothing of it until they accidentally learned that a treaty was under negotiation to upset their awards. They could have no access to the Senate, except to remonstrate blindly, without knowing what was actually going on in that body. Nevertheless the treaty was defeated and now hangs on a doubtful motion to reconsider.

The trial of the Abra case continued through five or six years, during which many witnesses were examined on both sides, the testimony being taken chiefly in Mexico under the eyes of her authorities. We respectfully submit that there is far more danger of fraud in the secret operations of the State Department, subject to influences which will never be made known, than in an open trial conducted as this was for so many years, and finally decided by an umpire of unimpeachable integrity.

FRED. P. STANTON,
SHELLABARGER & WILSON,
Attorneys and of Counsel for the Relator,
Plaintiff in Error.

110-63

Supreme Court of the United States.

OCTOBER TERM, 1883.

THE UNITED STATES, EX REL.
LA ABRA SILVER MINING COMPANY,
Plaintiff in Error,
vs.
FRED'K T. FRELINGHUYSEN,
Secretary of State.

No. 995.

In Error to the Supreme Court of the District of Columbia.

T. W. Bartley's Brief on Behalf of Plaintiff in Error.

This case brings up a petition for a mandamus to require the defendant, as the Secretary of State, to perform a ministerial duty enjoined upon him by an act of Congress in regard to money received by him from Mexico, on an award made in favor of the relator by the Joint American and Mexican Commission, under the Treaty of July 4, 1868, between the United States and Mexico. The defendant demurred to the petition, in the court below, and the case was there submitted without argument, and a judgment rendered *pro forma*, in order to have a prompt decision in this Court. The demurrer was sustained and the petition dismissed, and this judgment is here assigned for error. The demurrer having admitted the facts alleged in the petition, the case is relieved of all uncertainty and controversy as to the facts. If, on the facts set out in the petition, the relator is entitled to the money in question, now in the hands of the defendant, the judgment of the court below must be reversed.

ARGUMENT.

1st. There cannot be any doubt or difficulty here on the question of jurisdiction. If anything has ever been well settled by this Court, it is the doctrine, that where a specific duty or a ministerial act is enjoined by law upon the head of one of the Executive Departments, which he refuses to perform, the judiciary may require the performance of the act by the process of mandamus. The cases of Marbury *vs.* Madison, 1 Cranch, 137, and Kendall *vs.* The U. S., 12 Pet., 525, are directly in point. And these cases have been sustained by an unbroken chain of decisions down to the present time. The same doctrine has been fully sustained in the State courts. Ohio *vs.* Chase, 5 O. St. R., 529; Green *vs.* Mumford, 5 Rhode Island R., 472; Mott *vs.* Railroad Co., 30 Penn. St. R; Canal Comm'r, 10 Wend., 28. The same principle has the sanction of the English courts. In Ellis *vs.* Lord Grey, 6 Simon, 214 (decided in 1833), the process of injunction was awarded against the Lords of the Treasury, constituting the highest public functionaries of the realm, holding them amenable to that process under judicial authority. And in The King *vs.* The Lord Commissioners of the Treasury (decided in 1835), the whole Court of King's Bench concurring, a mandamus was awarded to those high officers commanding them to do what the mandate required.

2d. The attempted treaty, which has thus far at least been a failure, can certainly be no justification for the defendant. There can be no treaty without "*the advice and consent of the Senate;*" and that, too, "by the concurrence of two-thirds of the Senators present." Time and opportunity have been amply given for the concurrence of the Senate. And can the defendant's *mere hope* of obtaining hereafter the consent and ratification of the Senate, excuse his violation of the specific duty prescribed?

The money is there in his hands. A reasonable time has elapsed. The specific duty required has not been performed. Can this Court grant indulgence to the defendant, and excuse his violation of duty; and if so, for what length of time? If this court can indulge the defendant for one year, it can for ten years, or for an indefinite time.

But had the treaty been ratified when the Senate acted on it, could that have protected the defendant from the performance of the duty enjoined upon him by law? By the express terms of the treaty the award had become "final and *absolutely conclusive*," and the rights of private property had vested in it. The treaty was made by the Constitution "*the Supreme law of the land.*" And that had authorized the award, which had become final and conclusive. And not only so but, by the terms of the treaty, Mexico had thereby "*solemnly and sincerely engaged to consider the decisions as absolutely final and conclusive*," and further stipulated *to give full effect to such decision*, WITHOUT ANY OBJECTION, EVASION OR DELAY WHATSOEVER."

But this was not all. This finality and conclusiveness of the decision was the basis on which "the high contracting parties agreed to consider "*the* RESULT *of the proceedings of this Commission as a full, perfect and final settlement of every claim upon either Government arising out of any transaction of a date prior to the exchange of the ratification* of this Convention," and they further engaged *on this basis*, "*that every such claim, whether or not the same may have been preferred or laid before the said Commission*, shall from and after the conclusion of the proceedings of the said Commission, *be considered and treated as finally settled, barred and thenceforth inadmissible.*"

Now, it does not appear from the defence set up here, that Mexico has relinquished or released, or offered to relinquish or release, any of the benefits to Mexican citizens of the finality and conclusiveness of the decisions of the

Commission ; nor does it appear that Mexico has relinquished, or offered to relinquish, any of the stipulated benefits from the result of the proceedings of the Commission as a final settlement and bar to all claims against that country of a previous date, whether preferred before the Commission or not. Can it possibly be within the true intent or legal operation of this treaty, that Mexico can even claim, in violation of the terms of the treaty, to be released from the finality and conclusiveness of decisions of the Commission, and yet claim, and secure to Mexican claimants, and to the Mexican Government, all the results of the proceedings of the Commission ?

The Commission was created by the treaty to settle and adjudicate *private claims* against each government according to the established rules and regulations applicable to the administration of justice. Each claim was *the private property of the claimant.* And each claimant was compelled to institute his own suit, and to prosecute it at his own expense. La Abra Silver Mining Company preferred *its own claim*, and prosecuted it at enormous expense. When the award was obtained at great trouble and expense, after six years litigation, the claim ripened into a final adjudication, which, by the ordinary rules of the administration of justice, was final and conclusive as a judgment, but which by the terms of the treaty were made more strongly and positively so. The award was claimant's private property. And if there be any such thing as a vested right of private property in the judgment of any court, it existed here. This award was against the government of Mexico. And that government had not only solemnly stipulated, in a treaty which had become the supreme law of the land in both countries, that the award should be regarded as final and absolutely conclusive, and also had pledged its national faith "*to give full effect to the decision without any objection, evasion or delay whatsoever.*" Here were *the rights of private property vested* under the adjudi-

cation of a tribunal sanctioned by the highest pledges of the public faith of two nations of people, that its decisions should be absolutely final and conclusive. The final judgment of an ordinary court of justice of competent jurisdiction is said to be so conclusive and binding upon the parties as to import *absolute verity*; and neither party is to be heard or allowed to contradict it. The principle of estoppel closes the mouths of both parties and compels them to regard it as absolute verity.

If, under the circumstances of this case, the *rested rights* of private property are not to be regarded and protected; if the final judgment of an international court, six long years of litigation in being matured and obtained, is not to stand as conclusive; if the highest obligations of international treaties, and deliberate and mature adjudications under them are not to stand; if the highest and most solemn mutual pledges of the public faith of nations, made and sealed in all the ceremonies and formalities of international conventions, are not to be kept and maintained, but may be violated, set aside and frittered away upon mere *ex parte* charges of fraud, trumped up by interested parties, and attorneys employed on contingent fees, then all confidence in man, in nations, in the most august tribunals, and in the most solemn adjudications, is utterly destroyed, Upon this Court the American citizen relies for the guaranties of private property.

If Mexico can get clear of the payment of final and conclusive awards, thus rendered, and sanctioned by public authority, by employing an ex-President of the United States, and an ex-Minister of the United States to Mexico, who can approach in confidence the honorable Secretary of State, and on *ex parte* representations under the profound secrecy of the State Department, and without notice to the claimant or his attorneys, or a hearing from them, procure the awards to be set

aside by a new treaty, then international commissions to settle and adjust the mutual claims of citizens of two countries, against their respective governments, are most emphatically a farce and a fraud, and all such commissions should be forever hereafter eschewed and repudiated.

A new trial forsooth! Over six or seven years after the tribunal that tried the case had completed all its business and been dissolved—fifteen years and more after the transaction, and over two thousand miles from the place of its occurrence, and after near half the award had been actually paid! A new trial, indeed! It is known to be impracticable. It is absolutely absurd. It is simply a false pretense; a mere covering up of the actual repudiation of the awards. Nothing more nor less.

A final and conclusive award of an international commission, under which rights of private property have vested, cannot be thus set aside and repudiated by treaty. Private property cannot be taken without due process of law. The property of a citizen cannot be taken by a treaty and given to a foreign nation.

All the charges of fraud now made were in issue before the Commission; testimony taken on both sides fully as to them on ample time allowed, and the very questions of fraud now made were fully adjudicated and finally passed on. So that this became an adjudicated matter not only by the laws of the land, but also under the *positive terms* of the treaty above cited.

When the bill was pending in the United States Senate in 1878, for the distribution of the money on the awards of the American and Mexican Commission, ex-Confederate General Slaughter sent into the Senate his memorial, which he did not dare to verify on oath, charging fraud upon two of the largest awards rendered by the commission. And the result of these irresponsible charges of fraud was the fifth section of the act requesting the President "to investigate any charges of fraud presented by

the Mexican Government," &c., "and if he shall be of the opinion that the honor of the United States, the principles of public law, or considerations of justice and equity, require" the cases to be retried, to withhold payment, &c. The President referred the matter to Mr. Evarts, the Secretary of State. And the Mexican Minister demanded six months within which to show cause for a retrial, which Mr. Evarts afterwards extended to about ten months. When the Mexican Minister was ready, notice was given to the claimants and their counsel, and the cases were fully argued orally, and on printed arguments, on both sides, before Mr. Evarts, Secretary of State. On this argument, copies of a huge mass of *ex parte* affidavits were produced on behalf of Mexico touching the subject of the charges of fraud in the La Abra case. But they were the very same charges made on the trial of the case, and which had been fully contested and decided, both on the trial and also on the motion for a rehearing. This mass of *ex parte* affidavits was not filed, or submitted for the inspection or examination of claimant or his counsel. As a matter of courtesy only were the claimants allowed to see even the copies of the affidavits. But these affidavits were simply cumulative and impeaching testimony relating to the same matters upon which the Commission had passed in the trial of the case.

Hilliard on New Trials, ch. 15, sec. 9, says:

"The general rule upon this subject is, that after discovered evidence, in order to afford a proper ground for a new trial, must be such as reasonable diligence on the part of the party offering it could not have secured at the former trial; must be material in its object, going to the merits of the case, and not merely cumulative and corroborative or collateral; and must be such as ought to be decisive and productive on another trial of an opposite result on the merits. And, also, as is sometimes said, not impeached by, or going to impeach a former witness."

Again, sec. 4, p. 376, Ibid. As to the policy of new trials, it is said:

"Motions of this kind are to to be received with great caution, because the are few cases in which something new may not be hunted up, because it tends very much to the introduction of perjury to admit new evidence after the party who has lost the verdict has had an opportunity of discovering the points both of his adversary's strength and of his own weakness. * * * So it must be made to appear affirmatively that the evidence could not have been discovered by due and ordinary diligence."

Ibid., sec. 6. "As already intimated, a new trial will not be awarded on the ground of newly discovered evidence when it appears that the testimony was, or ought to have been, known to the party before the trial, and no sufficient excuse is shown for not procuring it. There must have been no delay; and the proof of diligence must be clear."

* * * * * * * *

Ibid., sec. 9. "The discovery of *new documentary evidence*, that might have been obtained in season, will not authorise a new trial."

* * * * * * * *

Ibid., sec. 13. "Newly discovered evidence merely *cumulative* is no ground for a new trial. It must appear affirmatively that the evidence is not cumulative, and not intended for the mere contradiction or impeachment of other witnesses."

No charge of fraud has ever been made against any member of the Commission or the Umpire. The whole ground of the charges of fraud, which have been made in this case, relates to the matters which were litigated and adjudicated in the case.

The charges of fraud in this case were infamously false, but similar in character to those made by Mexico against the claims of every American claimant before this Commission. In vindication of the company, I beg to add the following facts gathered from the record, in the case, before the Commission:

1st. That La Abra Silver Mining Company is composed

of respectable and enterprising business men in New York, St. Louis, and other places, *is not and cannot be disputed.*

2d. That the company had purchased, paid for, and owned the mine, and had expended over three hundred thousand dollars on it, was proven and not denied in the case.

3d. That the company was working the mine, and had taken out a veay large amount of silver ore which lay upon the ground awaiting the arrival of machinery, when the company's hands fled for safety, was proven most clearly.

4th. That the company's hands fled from the mine in fear of their lives from the military and tumultuous proceedings of the Mexicans, one of the hands having been killed ; and that the secretary of the company fled in such haste and alarm for his life that he left the books and papers of the company subject to the control of the Mexican authorities, are facts positively proven in the case.

5th. That the claim of the company, predicated mainly on the value of the mine, was $3,030,000 ; and that the Umpire, Sir Edward Thornton, on great consideration and deliberation, allowed only $683,000, as the smallest amount he could in his judgment on the proof allow, and that the company was greatly disappointed and aggrieved by the reduction of their claim, are facts which cannot be disputed.

6th. That the case was contested before the Commission and Umpire for six years and more, and testimony taken at full length on both sides, on ample time allowed, and that, too, chiefly in Mexico and before Mexican authorities, are facts which cannot be disputed.

7th. That the award was rendered *fairly and on full consideration,* and on ample time given for litigation, and without any imputation of fraud or unfairness on the

part of the Commission, or the Umpire, or the attorneys on either side, in the trial of the case, cannot be disputed.

T. W. BARTLEY,

Of Counsel for
La Abra Silver Mining Co.

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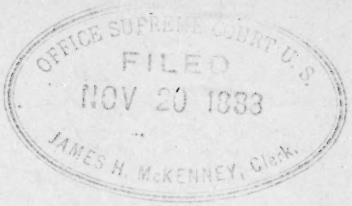

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 995.

THE UNITED STATES, EX REL. LA ABRA SILVER MINING COMPANY,

Plaintiff in Error,

vs.

FREDERICK T. FRELINGHUYSEN,

Secretary of State.

BRIEF FOR THE PLAINTIFF IN ERROR.

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Evening Post Job Printing Office, N. Y.

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BRIEF FOR THE PLAINTIFF IN ERROR.

Statement of the Case.

This was a petition of the relator to the Supreme Court of the District of Columbia, praying for a writ of mandamus, commanding the defendant, as Secretary of State, to pay to the relator the money which was paid to said Secretary by Mexico, in January, 1882, on the award that was rendered in favor of the relator against Mexico, under the treaty between the United States and Mexico, of July 4, 1868.

The defendant demurred to the petition, and with the view of expediting the case to this court, it was submitted

without argument and a *pro forma* judgment rendered sustaining the demurrer and dismissing the petition.

That judgment is now assigned as error.

The facts appear in the petition ; they are succinctly given there, and for them, reference is made thereto instead of repeating them here. Very briefly stated, the petition alleges said treaty ; the rendition of said award in pursuance of it ; the Act of Congress of June 18, 1878, and the action of President Hayes and Secretary Evarts thereunder ; the payment by Mexico to the defendant as said Secretary, of an installment on said award in January, 1882 ; a demand of the money made by the relator of said Secretary, and the refusal of the latter to pay it over, and that the relator is without remedy except by the writ of mandamaus.

The facts alleged in the petition stand admitted by the demurrer, and the only questions that can arise are upon the legal conclusions averred in the petition, and the interpretation of the laws involved in the case.

Argument.

The Act of Congress of June 18, 1878, mentioned in said petition, consists of five sections, two only of which—the first and fifth—have any bearing upon this case. It is not claimed or pretended that there is or ever was any money due from the relator to the United States, or that the United States has not been fully reimbursed, its expenses incurred in executing the provisions of the treaty (the full amount thereof having been retained out of the first installment paid by Mexico to the United States upon the awards), the subjects to which the 2d and 3d sections relate, and the only exception or limitation mentioned in the first section affecting the case is that of the fifth section.

Those two sections are as follows :

SEC. 1. That the Secretary of State be, and he is hereby, authorized and required to receive any and all moneys which may be paid by the Mexican Republic under and in pursuance of the conventions between the United States

and the Mexican Republic for the adjustment of claims, concluded July fourth, eighteen hundred and sixty-eight, and April twenty-ninth, eighteen hundred and seventy-six; and whenever, and as often as, any installments shall have been paid by the Mexican Republic on account of said awards, to distribute the moneys so received in ratable proportions among the corporations, companies, or private individuals respectively in whose favor awards have been made by said commissioners, or by the umpires, or to their legal representatives or assigns, except as in this act otherwise limited or provided, according to the proportion which their respective awards shall bear to the whole amount of such moneys then held by him, and to pay the same, without other charge or deduction than is hereinafter provided, to the parties respectively entitled thereto. And in making such distribution and payment, due regard shall be had to the value at the time of such distribution of the respective currencies in which the said awards are made payable; and the proportionate amount of any award of which by its terms the United States is entitled to retain a part, shall be deducted from the payment to be made on such award, and shall be paid into the treasury of the United States as a part of the unappropriated money in the Treasury.

SEC. 5. And whereas, the Government of Mexico has called the attention of the United States to the claims hereinafter named, with a view to a rehearing, therefore,

Be it enacted, That the President of the United States be, and he is hereby, requested to investigate any charges of fraud presented by the Mexican Government as to the cases hereinafter named, and if he shall be of the opinion that the honor of the United States, the principles of public law, or considerations of justice and equity require that the awards in the cases of Benjamin Weil and La Abra Silver Mining Company, or either of them, should be opened and the cases retried, it shall be lawful for him to withhold payment of said awards, or either of them, until such case or cases shall be retried and decided in such manner as the Governments of the United States and Mexico may agree, or until Congress shall otherwise direct; and in case of such retrial and decision, any moneys paid or to be paid by the Republic of Mexico in respect of said awards, respectively, shall be held to abide the event, and shall be disposed of accordingly; and the said present awards shall be set aside, modified, or affirmed, as may be determined on such retrial: *Provided*, That nothing herein shall be construed as an expression of any opinion of Congress in respect to the character of said claims, or either of them.

AS TO THE FIRST SECTION OF SAID ACT.

This section considered without reference to and exclusive of the fifth section, made it the plain duty of Mr. Secretary Frelinghuysen to pay over the money in question to the relator.

I.

It makes the Secretary of State the recipient of the money which Mexico may pay, and for the evident purpose of handing it over to the awardees, and it requires him "whenever and as often as" Mexico makes a payment, to distribute the money among those, "in whose favor awards have been made," their representatives or assigns, in ratable proportions. It is mandatory, and clothes him with no discretion, and leaves him no option; the act to be done was plainly ministerial, and the arithmetical computation necessary in order to make the distribution does not change its character. It assigned him a specific duty, the performance of which affected individual rights, and in that performance he was not placed under the direction of the President; and since the time of the decision in the case of Marbury *v.* Madison, 1 Cranch, 137, it has been too well settled, and the law is too well known to admit of argument, that if this case is considered upon the first, and exclusive of the fifth section, the relator has a remedy against the Secretary to compel him to perform that duty, and that that remedy is mandamus.

II.

A right is vested when it has "become a title, legal or equitable, to the present or future enjoyment of property,

or to the present or future enjoyment of a demand, or a legal exemption from a demand made by another" (Cooley's Con. Lim., *359).

That a final judgment of a municipal court of exclusive jurisdiction is such a right, is property, need only be stated (13 N. Y., 378, 384, 385, 396, 397; 12 N. Y., 202, 211; 15 Pa., 18).

The tribunal which made the award to the relator upon which the money in question was paid to the Secretary of State, was created by a supreme law of the land, a treaty between the United States and Mexico; that law gave it jurisdiction over all claims of the citizens of each country against the Government of the other for injuries to person or property resulting from the acts of its authorities, forever barred all such claims not submitted to it, required it to examine and decide "each case according to public law, justice, and equity," and declared all the awards it rendered "absolutely final and conclusive," and that they should be given "full effect without any objection, evasion or delay whatsoever." The claims submitted to it were the private property, the choses in action of the respective claimants, and they prosecuted the same before it in their own names and right, and at their own expense, not only as to procurement of witnesses and employment of attorneys and counsel, but also, through the assessment upon the awards, provided for by the sixth article of the treaty, which has been made and retained, paid all the expenses of the commission and of both Governments in the matter (the share thereof thus paid by the relator being, as its petition shows, $28,550), and the awards were made to the respective claimants. Upon principle, therefore, the awards of this international tribunal—a competent tribunal of exclusive jurisdiction—were the judgments of a court, and possessed all the attributes, and were indued with all the efficacy of the judgments of our municipal courts of last resort, were the property of the claimants, and vested in them a legal right to the recovery, were in no sense or respect a donation or gratuity from our Government, and the United States, to whom the money for their satisfaction is, by the provisions of the treaty in the first instance, paid, receives

it in trust for the claimants; and so the authorities hold in like cases.

1 Pet., 212, 215, 217, Comegys *v.* Vasse.
17 How., 612, Judson *v.* Corcoran.
6 Wall., 160, 165, 166, Reichart *v.* Felps.
13 Opinions of Atty's. Genl., 19, 23, 24, Gibbs' Case.
1 Court of Claims, 135, New England Mississippi Land Co.

The relator, therefore, has a perfect title to the money in question, if that be deemed material, and, it may be added, that said money was paid by Mexico to the United States to apply upon said award, and that the moment the Secretary of State received it, it was a satisfaction of said award *pro tanto*.

Nevertheless, it is submitted that it was not within the province of the Secretary of State to inquire whether the relator had a vested right, a title to the money, or not. He had no power or discretion to determine or doubt; the same first section which authorized him to receive the money commands him to pay it over to the relator, its representatives and assigns, and makes him merely a vehicle for the transmission of the money, simply an instrument to execute the provisions of that section; and for his refusal to do so, he is amenable to the writ of mandamus, unless the fifth section of said act has relieved him from the exigency of that command.

AS TO THE FIFTH SECTION OF SAID ACT.

This section does not exonerate the Secretary of State from the duty of paying over the money in question to the relator.

First.

When the money came to his hands, the investigation and opinion provided for by that section had been made

and given by the President, and by reason thereof, said section had become inoperative, and it then in nowise affected the duty devolved upon the secretary by said first section.

I.

Assuming for the present, for the purpose of this point, that that section is constitutional and valid, it will be seen that three things are embraced in it, viz.:

1st. A request that the President investigate the charges made by Mexico against this case;

2d. If the investigation satisfied him that the "honor of the United States, the principles of public law, or considerations of justice and equity" required an opening of the relator's award and a retrial of the case, *then* made it lawful to withhold the money payable thereon; and,

3d. Made it lawful to continue such withholding until such retrial had been had in such manner as the Governments of the United States and Mexico may agree and the decision thereon, or until Congress should otherwise direct.

The first authorized the investigation to be made by the President, and solely with the view to an opening of the award and a retrial of the case; the second legalized the withholding of the money, the payment of which had been commanded by the first section, and the withholding of which without this authorization, would have been unlawful, but authorized it only in case the President decided that said re-opening and retrial were required, in other words, made such decision a condition precedent to a lawful withholding of the money; and the third fixed the period of time during which such withholding might be lawfully continued. And as the case was one in, and the award was made by an international tribunal, a "*retrial*" of the case could only mean another trial before an *international* tribunal and between the same parties; and as the tribunal before which the case was tried had ceased to exist, and said section provided that the retrial should be "in such manner as the Governments of the

United States and Mexico may agree," the plain meaning was that there was to be a "new convention or negotiation respecting the same between the United States and Mexico."

II.

President Hayes, through the Secretary of State, Mr. Evarts, made the investigation requested by said section, and the latter reported his opinions and conclusions thereon to said President, who approved the same, and they thereby became his opinion or decision of the matters submitted to the President by said section, and the whole fully appears in Mr. Evarts' report to President Hayes, under date of April 13, 1880, which is embodied in the communication to Congress made by that President under date of April 15, 1880, and particularly referred to in the relator's petition herein.

Thereby President Hayes decided expressly that "neither the principles of public law nor considerations of justice or equity require or permit, as between the United States and Mexico, that the award in this case should be opened, and the case retried before a new international tribunal, or under any new convention or negotiation respecting the same, between the United States and Mexico." He did not in express terms give his opinion that the "honor of the United States" did not require a retrial, but he at the same time also gave his opinion as to what that "honor" *did* require, and that was that this case "should be further investigated by the United States, to ascertain whether this Government has been made the means of enforcing against a friendly power a claim of our citizens exaggerated by fraud;" and that "if such further investigation" established such to be the fact, "the honor of the United States will be vindicated by such measures as may then be dictated;" and he thus as completely decided that the "honor of the United States" did *not* require a *retrial*, as if he had expressly said so, and coupled it with the sentence in which he says that "neither the principles of public law, nor considerations of justice or equity require"

a retrial. The expression of the one was the exclusion of the other; and this the more in this case because, on the question of opening the judgment of a court and granting a new trial between parties, of whom the United States was not one, it is impossible to conceive that the "honor of the United States" could require anything different from, or at variance with what "the principles of public law, or considerations of justice and equity" required; and the President had decided expressly, not only that neither of these did require, but that each of them *forbade* that thing to be done. It is further manifest that President Hayes decided that the "honor of the United States" did not require a retrial of this case, from the conclusion reached by Mr. Evarts, and approved by the President, wherein he says, "I am *confirmed in the opinion* that the further consideration which the honor of the Government should prompt it to give to this award" should be limited to an investigation of the question of an "exaggeration of the claim by the parties before the Commission;" in other words, to the amount of the damages, and this plainly precludes and negatives the idea or propriety of a retrial, for a retrial involves the merits of the whole case, the entire cause of action, the right to any damages at all, as well as the amount of them. And thus President Hayes decided all the matters that were referred to the President by the fifth section, and the decision was within the terms of the submission.

The preamble to the fifth section shows that what Mexico sought was a "rehearing," wherefore, the submission was made to the President, and the thing submitted to be determined was whether the award ought to be opened and a "retrial" had, the obvious meaning of all which is, as already stated, another trial before an international tribunal between the contesting parties. A trial before a domestic tribunal is not contemplated by the section, and Mr. Evarts nowhere gives the opinion, or suggests that there be a trial before a domestic tribunal, much less is he guilty of the solecism of suggesting a domestic *retrial.* But what he does do is to suggest that there should be a "*further investigation by the United States,*"

and to the end that it may inform itself whether it has been used as an instrument in imposing on a friendly power, &c., and that in this direction lay the vindication of the honor of the Government. If that honor was concerned at all, it was precisely in the direction indicated by Mr. Evarts. But such an investigation, and for such a purpose as he suggested, was not within the matters submitted to the President; had it been, there would have been no need to say to Congress, as he did, that if it is to be made, you must authorize it to be done and direct a further withholding of the money. This suggested further investigation by the United States was matter palpably *coram non judice*, and its relevancy now here is, that it shows that the President thereby decided what the "honor of the United States" *did* require, and he thus decided it did *not* require a "retrial," as completely as if he had said so in those words.

III.

Furthermore, justice to President Hayes and Secretary Evarts, who, after said decision, were liable to the charge of withholding the money unlawfully (that decision having freed the first from the fifth section of said act), as well as the injustice to the relator of further delaying payment, alike required Congress to act promptly in the matter, if it coincided with this suggestion of a further investigation by the United States, and very properly that Secretary declared in his said report, that "unless Congress should now" (*i. e.*, at the then present session, no one can understand its meaning to be, *instanter*) make the suggested disposition of the matter, and give him definite direction to withhold further payments, it would be "the duty of the Executive to accept this award as no longer open to reconsideration, and proceed in the payment of the same *pro rata* with all other awards under the convention."

Thereupon, a bill was introduced into the Senate, and referred to the Judiciary Committee, which provided for

an investigation, or *quasi* trial, of this case before a domestic tribunal, the Court of Claims, and expressly made it unlawful for the Secretary of State to pay over any of the money pending the proceedings therein; but on the 10th day of June, 1880, the bill was indefinitely postponed by the Senate, in accordance with the unanimous recommendation of that Committee made in the report of Mr. McDonald, its Chairman, reporting it back adversely (Senate Rep. No. 712, 46th Cong., 2d Sess.). And on the 9th day of June, 1880, an identical bill was reported to the House by Mr. Cox, Chairman of the Committee on Foreign Affairs; but soon after, that Committee asked leave to recall it, and the House ordered it back to the Committee, and it was never again reported (H. of Rep. Report No. 1702, 46 Cong., 2d Sess.). (These bills are Senate No. 1682; H. of R. No. 6452, 46th Cong., 2d Session).

Both of these bills, as said reports of said Chairman of said Committees show, were based upon the said report and suggestion of Mr. Evarts, of a further investigation of this case by the United States; and though in popular phrase it is said that Congress took no action upon this suggestion, because a bill to carry it out did not go to a vote in both Houses, yet, the above mentioned final disposition which each House by itself made of that bill, was something more than that resulting from non-action, and it was in each substantially, and in the Senate emphatically, action adverse to that suggestion of Mr. Evarts, and was notice to him and the President, that one House preferred *not to adopt* said suggestion, and that the other *affirmatively disapproved* of it. And upon the close of that Session of Congress, no action, or more properly speaking said adverse action, having been taken in the matter, President Hayes and the Secretary of State did, what in said communication of that President to Congress it was declared would be done, viz.: the President accepted said award as no longer open to reconsideration (not even the limited domestic investigation as to the amount of damages, which alone was the only reconsideration suggested by him), and Mr. Secretary Evarts paid upon it its share of the installment then in hand. The petition of the

relator alleges (fol. 10), that upon the adjournment of Congress, "the President *held* the said award as no longer open to reconsideration, and the Secretary of State *accordingly* thereafter in 1880, paid upon your petitoner's said award its proper proportion" of the installment then in hand, and that its proper proportion of the installment of the following year was likewise paid. These allegations stand admitted by the demurrer; but if the defendant had answered instead of demurring, he could not have denied them for they are true, and are facts of record in his office.

Here, then, was action, action by the Secretary who gave the opinion that became the decision of the President, action that was unmistakable, that could not have been taken had not the matters submitted to the President been fully decided, and which presupposes, and the law makes evidence of such decision (14 Pet., 448, 458). And if it can be pretended that President Hayes had not decided all the matters submitted to the President, prior to said declaration to Congress that unless Congress now gave authority to make the suggested further investigation, and directed the money to be withheld, &c., the President would accept this award as no longer open to reconsideration, and pay it the same as the other awards, then certainly, that declaration, and the adverse action of Congress upon the suggestion therein (or, if it be preferred so to regard it, the failure of Congress to act thereon), and the subsequent action of Mr. Secretary Evarts in paying the money, together constitute a full decision and final disposition of said matter.

IV.

It is claimed, however, on the part of the present Secretary, that the above mentioned report of President Hayes to Congress remitted to Congress the whole matter that was referred to him by said fifth section, and that the above mentioned declaration of Mr. Evarts embodied in that report, was an attempt to limit the right and discretion of Congress to act upon the matter. This is erroneous.

Said fifth section did not contemplate any report to Congress, or any supplementary legislation, certainly none if the decision of the President was against a retrial. That was his decision, and in reporting it to Congress in reponse to the request of the Senate, a suggestion was made that was entirely outside of the matter which had been submitted to him, viz., the suggestion of a further investigation by the United States, and not for the purpose of a retrial; and it was this extraneous suggestion, and this only that was submitted by him to Congress. And in submitting it, it was entirely competent for President Hayes, through the report of Secretary Evarts, to say, as he did in substance and in brief, that he had decided the matters submitted to him, and against a retrial; that consequently the discretion to withhold the money under said fifth section, could not possibly be extended by him beyond a certain time specified; that he suggested a further investigation which there was no authority given to make; that if Congress concurred in the propriety of that suggested investigation, and wished to stay the effect of that decision by having the money withheld until the suggested investigation could be made, it was necessary to confer the authority and the means to make it, and definitely direct the withholding of the money before that specified time had expired; and that failing to do so, within that time, he would consider the matter closed and ended in accordance with his decision, the same as if said suggestion had not been made, and proceed to carry that decision into effect by paying over the money. It in nowise attempted to limit the right of Congress to act, but it imposed a limit upon himself, as to the time during which he would withhold payment of the money belonging to a citizen, the only warrant for the withholding of which his decision had destroyed, and the time during which he would, by refraining to carry that decision into full effect, remain in the attitude of disregarding the mandate of the law contained in the first section of said act.

As an illustration of the propriety and competency of such a declaration from the Executive to Congress, and the results which may flow from it, we deem it proper to re-

fer to the one made by President Arthur May 25, 1882, in the matter of the contest over the Venezuela awards, and made too, in the very words and upon the recommendation of Mr. Secretary Frelinghuysen contained in his letter to that President, transmitted by the latter to Congress with the declaration, the same as was done done by President Hayes with the letter of Mr. Evarts. That declaration is, "In case neither House take action upon it" (the above mentioned matter) "during the present Congress, I shall feel it my duty to direct that this prolonged discussion be definitely terminated by recognizing the absolute validity of all the awards." (Ex. Doc. No. 208, 47 Cong., 1st session.) Now, this declaration to Congress would be puerile, and the recognition of the "absolute validity" of the awards could not possibly "definitely terminate" the discussion, unless, in case of Congressional non-action within the limited time, such non-action, said declaration and such subsequent action by the President, together were tantamount to a *final* decision of the matter, and such a decision obviously could not be final, unless it was to be observed by, and concluded his successors in office. And surely, the present Secretary will be unwilling to have the otherwise irresistible inference drawn, that such a mode of deciding such a matter, and such a decision thereof, are proper, and entitled to observance and respect *only* when adopted and made by the present Executive and upon the recommendation of the present Secretary.

V.

The position taken in support of the demurrer that the jurisdiction conferred upon the President by the fifth section, is a continuing one, and the matters submitted to him may be reinvestigated and redecided by each successive incumbent of the Executive office, and several times by the same President, whenever, and as often as instalments are paid, we submit has no foundation in law to sustain it.

Said section made the President a special tribunal to in-

vestigate and decide certain matters; these matters were the charges which Mexico presented to the United States relative to this case; *they* were the subject matter of the jurisdiction, to them it attached, and upon them and them only could it be exercised; and, as soon as they should be investigated and decided, the subject matter of the jurisdiction was, in legal effect, extinguished, and the jurisdiction was ended. Power to withhold payment (not of any particular installments, but of the award) was given, but only in case a decision of the matters upon which the jurisdiction was to be exercised, was in favor of a retrial, and then only as means to an end; but neither the installments themselves nor the payment of them, were to be investigated, and they formed no part of the subject matter for the jurisdiction, and obviously, they could not continue it, and much less, from time to time as paid, resuscitate it when it had once been exercised and thus been extinguished. And President Hayes having investigated and decided the matters submitted, having exercised the jurisdiction conferred upon the President by said fifth section, the special tribunal created by it, had performed its functions and ceased to exist, and all jurisdiction was ended and gone; and there was neither jurisdiction to act, nor subject matter to act on, to survive or continue to a successor in the office of President, or which he could lay hold of under said section.

VI.

Equally untenable is the position, that President Arthur, as a successor in the office of President can review and reverse this decision of President Hayes. Under certain circumstances the incumbent of an office can review the decision of his predecessor, if the case is one in which the decision was of matters that were devolved upon the officer in the regular course of his duties as such, by virtue of his office, but otherwise not. (15 Pet., 401, U. S. *vs.* Bank of Metropolis). Here, in this case, the decision of President Hayes was not of such matters, but of matters

that were referred to the President for examination and decision by, and he acted wholly under a special act of Congress. It created him a special tribunal to decide upon those matters, his action was of a judicial character, and no appeal from his decision was given, and in such case the decision of such a tribunal is final and conclusive. The authorities are numerous, we refer to two only. In Wilcox *v.* Jackson, 13 Pet., 498, 511, in reference to the decision of a register and receiver of the Land Office, to whom acts of Congress had given the power of deciding upon claims to the right of pre-emption, the Court say, "that upon those questions they act judicially, that no appeal having been given from their decision, it follows as a consequence, that it is conclusive and irreversible." And in Foley *v.* Harrison, 15 How., 433 448, with reference to a decision that had been made by the Commissioner of the General Land Office under the act of Congress which authorized him "to determine upon principles of equity and justice as recognized in courts of equity, and in accordance with general equitable rules to be settled by" the officers therein named, all cases of suspended entries then existing in said office, and to adjudge in what cases patents shall issue upon the same, the court say, "as this decision was made by a special tribunal with full power to examine and decide, and as there is no provision, for an appeal to any other jurisdiction, the decision is final within the law."

These installments extend through fourteen years, and to hold that each successive President may re-examine, redecide and withhold the money, would be to impose upon the relator a litigation virtually never-ending, and that, too, with respect to a judgment which a supreme law had expressly declared final and conclusive, would subject that judgment entirely to the will, and the payment of it entirely to the power and control of each succeeding President. There is nothing in the fifth section requiring or justifying, but everything negativing such an intolerable construction of it.

VII.

Thus everything that was requested of, and submitted to the President by the fifth section of said act, was done, fully passed upon, and definitely decided by President Hayes, and all the power and discretion given to the President by it were thereby executed and exhausted, and that section, for all the purposes of a law, was inoperative, spent and dead. Thenceforward, and at the time the installment of 1882, the money now in controversy, came to the hands of Mr. Secretary Frelinghuysen, said Act of June 18, 1878, for all intents and purposes was, and it directed and controlled the action of that Secretary thereunder, precisely the same as if said fifth section had never been enacted.

Said decision of President Hayes was a matter of record in the office of the Secretary of State; if any one could rightly say that it needed construction, it had been construed, emphasized and enforced by the unmistakable acts of the learned lawyer and wise statesman who prepared it, and by the acts of the succeeding administration, also of record in said office; and as to them, it is not possible to say that there was any obscurity, uncertainty or doubt whatever. The command in the first section, freed as that section had been from the exception relating to the fifth section, was clear and emphatic that the Secretary pay over the money in question to the relator, the act to be done by him was plainly ministerial, and it affected a private right, and it was incumbent upon him to obey that mandate. The exposition of the law belongs to this court, and it was not within the province of the Secretary to indulge in doubts or speculations respecting it, and we submit tnat he cannot rightfully be permitted thereby in effect, in the language of the Chief Justice in Marbury *against* Madison, "to sport away the vested rights" of the relator.

Second.

Said fifth section of said Act of June 18, 1878, is unconstitutional and void, and for that reason it is no legal justification to the Secretary of State for withholding said money, and he should be compelled to pay it to the relator.

I.

The judicial power of the United States is vested by the Constitution in the Supreme Court and in such inferior courts as Congress may from time to time ordain and establish, and the power confided by it to the Judicial Department cannot be exercised by the legislative.

The Constitution expressly prohibits the depriving of a citizen of his property without "due process of law."

It is a fundamental principle of our Government that private property shall be held sacred; that a law shall not have a retroactive effect so as to destroy or injure a vested right. This is one of the implied reservations of individual rights under the Constittuion, and the reservation is as an effectual limitation on the powers granted by it as an express prohibition.

A law which infracts either of the above mentioned powers or principles of this court—the ultimate arbiter—will, when properly brought before it, declare to be unconstitutional and void.

103 U. S., 168, 190, 193, Kilbourn *v.* Thompson.
13 Wall., 128, United States *v.* Klein.
20 Wall., 655, 663, Loan Association *v.* Topeka.
2 Peters, 627, 657, Williams *v.* Leland.
7 John. (N. Y.), 477, 502, Dash *v.* VanKleeck.
12 N. Y., 202, 205, 209, 211, Westervelt *v.* Greigg.
3 Greenleaf (Me.), 326, 336, Lewis *v.* Webb.
3 Vermont, 507, 514, Hill *v.* Sunderland.

1 N. Hamp., 199, 212, 214, *et seq.*, Merrill *v.* Sherburne.
2 Chipman (Vt.), 77, 88, 89, Bates *v.* Kimball.
28 Wis., 464, Durkee *v.* City of Janesville.

II.

As already hereinbefore shown, the award in favor of the relator is equivalent to a judgment of one of our highest municipal courts, and is a vested right of property in the relator.

The treaty under which it was obtained, as between the United States and Mexico, is a contract; but, as between the former and its citizens, the Constitution makes it a law, and, in so far as the individual rights of its citizens are affected by it, it stands on the same footing as Acts of Congress, and Congress may modify or repeal it by other laws, if the latter be such as to be within the limits of its constitutional powers. It follows, necessarily, that the right of a citizen—of this relator—acquired under the treaty is to be construed by the same rules, is held by the same tenure, and is protected by the same principles as a like right acquired under an Act of Congress, or any other legislative enactment.

2 Pet., 253, 314, Foster *v.* Neilson.
11 Wall., 616, 620, The Cherokee Tobacco.
2 Curt., C. Ct., 454, Taylor *v.* Morton.
16 How., 635, 657, Doe *v.* Banker.

III.

Said fifth section of said act authorized the President to decide whether said award should be opened and said case retried, and if he decided it should be, authorized the withholding of the money until the case had been retried and decided; in other words, it in substance and effect empowered the President to grant a new trial in this case, and gave a right to withhold the money dependent upon his granting it.

This, Congress had no power to do.

1st. Because the granting of a new trial is a judicial act, and the power exercised in so doing is judicial in its nature. It belongs to the courts of law from immemorial usage, is incidental to their other powers, and is peculiar to the judicial department of our Government, and in which it is vested. Congress does not possess that power, and could not confer it upon the President.

Same authorities as are cited under I., and particularly 1 N. Hamp., 199, 293, *et seq.*; 2 Chipman, 77; 3 Greenleaf, 326; 103 U. S., 168; also

15 Pa., 18, De Chastellux *v.* Fairchild.

43 Pa., 512, Bagg's Appeal.

10 N. Y., 374, Burch *v.* Newbury.

2d. Because the granting of a new trial by the President would deprive the relator of its property without "due process of law."

The relator's judgment being property, the granting of a new trial would deprive him of it by destroying the judgment.

Same authorities as last above cited.

It does not change it, that said fifth section contemplates that the judgment, instead of being set aside directly by the grant of a new trial, shall stand, pending it, and provides that it "shall be set aside, modified or affirmed as may be determined on such retrial." The law under which this judgment—this vested right of property—was obtained, expressly made it final and conclusive, and its absoluteness is a constituent, essential and valuable element of that right, and the destruction of the finality of the judgment is as indubitably an overthrow of that right as would be the annihilation of the judgment itself. Besides, practically, that would be destroying the judgment, for the effect upon the relator's property would be the same in either case, the evidence of which is, that by a new trial the relator would, in each case equally, be thrown back upon the original cause of action, and be

compelled to litigate anew that which was merged in, and would otherwise be concluded by the judgment itself; and its claim, which in and by the judgment had become indefeasible by the laws in being when the judgment was rendered, would be "launched again on the sea of litigation, to be lost or saved as accident and opinion might afterwards happen to injure or befriend" the relator. The phraseology of the law in the above cited case in 1 N. H., 199, and which was held unconstitutional, is almost identical with that above quoted from said fifth section.

If the law *may* result in depriving the relator of his property, that is a contingent deprivation and is within the prohibition of the Constitution.

10 N. Y., 374, 397, Burch *v.* Newberry.

"Every partial or private law which directly proposes to destroy or affect individual rights, or *affords remedies which lead to similar consequences*, is unconstitutional and void."

2 Yerger (Tenn.), 554, 555, Wallys Heirs *v.* Kennedy.

Id., 599, 605, 621, State Bank *v.* Cooper.

And the power given to the president to grant a new trial being unlawful, depriving the relator of its property through the exercise of that power would, for that reason alone, be doing so without "due process of law," as well as for the manifest one that the proceeding itself, instituted by said fifth section is not "due process of law."

74 N. Y., 183, 190, *et seq.*, Stewart *v.* Palmer.
12 N. Y., 202, Westervelt *v.* Gregg.
4 Hill (N. Y.), 140, 146, 147, Taylor *v.* Porter.
11 Mass., 396, 401, 405, Holden *v.* James.
53 Pa., 112, Huber *v.* Riley.

3d. Because the fifth section is retrospective in its operation, and the granting of a new trial would destroy a vested right.

Even though the law be a "mere gratuity," yet "vested rights may be acquired under it and by virtue of it; and

when such rights have been acquired they are beyond the reach of the Legislature."

97 U. S., 293–295, Memphis *v.* United States.

"Most civil rights are derived form public laws * * * The power that authorizes or proposes to give, may always revoke before an interest is perfected in the donee. * * But it is clearly unwarrantable thus to take from any citizen a vested right."

1 N. Hamp., 214, *et seq.*, Merrill *v.* Sherburn, and the last seven authorities cited under I.

IV.

The power to grant a new trial sought to be conferred upon the President by said fifth section being invalid, and its exercise unlawful, and said section void in that respect, the right to withhold the money which is dependent upon the exercise of that power, necessarily falls with it, and said fifth section of said act does not affect the first section, and the former, even though it had remained unexecuted, would be no obstacle in the way of the relator's right to a writ of mandamus.

Third.

Upon the record of this case then, the Secretary of State withholds the money of the relator without justification or excuse, and contrary to and in defiance of an existing law, and is therefore in the attitude of doing so, because the money being in his hands, the opportunity exists, and it can be done physically. That is an act of arbitrary power, and falls within the reprehensions given in that incomparable statement of the rights of the citizen as against the Government, and the obligations of an officer of the law to obey it, made in the recent decision of this court in the

case of the United States *v.* Lee (106 U. S., 220, 221), a statement that will be learned and cherished by every lover of liberty regulated by law.

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it.

"It is the only supreme power in our system of government, and any man who by accepting office participates in its functions, is only the more strongly bound to submit to that supremacy and to observe the limitations which it imposes upon the exercise of the authority which it gives.

"Courts of justice are established, not only to decide on the controverted rights of the citizens as against each other, but also upon the rights in controversy between them and the Government, and the docket of this court is crowded with controversies of the latter class."

"Shall it be said in the face of all this, and of the acknowledged right of the judiciary to decide, in proper cases, statutes which have been passed by both branches of Congress and approved by the President to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the Government, without lawful authority, without due process of law and without compensation, because the President has ordered it, and his officers are in possession?

"If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe nor in any other government which has a just claim to well regulated liberty and the protection of personal rights."

Fourth.

For these reasons the judgment of the court below should be reversed and the peremptory writ of mandamus issue.

In conclusion, we ask leave to add that the fact of the negotiation of a new treaty by Mr. Secretary Frelinghuysen, between the United States and Mexico, granting a new trial in this case before a single Commissioner, to be by the two Governments appointed, and which is said to be pending in the Senate, is not a fact in the record of this case; but that if it was, all the foregoing considerations as to the unconstitutionality of said Act of June 18, 1878, would apply to it with equal or greater force, substituting the President and Senate—the treaty-making power—in place of Congress, which passed said act. Such a treaty, invading the powers of the Judicial Department as it would do, retrospective in its action as it would be, creating a new and special tribunal and conferring a special jurisdiction to try a single case after it has arisen, exempting one party from existing rules of law and imposing onerous conditions upon the other at variance with those rules, and granting to that one party new and substantial rights at the expense and by a corresponding invasion of those of that other party, the relator, as it would do, would be an exercise of power by that branch of the Government to which the power of making the laws called treaties is confided, which would be unconstitutional and would be justly classed and characterized as arbitrary.

Says Lowrey, Chief Justice, in the case of Bagg's Appeal, 43 Pa., 512: "There ought to be no arbitrary governmental dealing with private rights. * * It is not by its author, but by its nature that we judge of the arbitrariness of an act. * * Any form of direct governmental action on private rights * * which makes a special law for a particular person, or gives direction for the regulation and control of a particular case after it has

arisen, is always arbitrary and dangerous in principle and almost always unconstitutional. * * * We could never acquire the idea of justice if there were no law to regulate social intercourse, and if all human conduct were mere arbitrariness. Justice means treatment according to law, *some* law taken as a standard; and that is the most complete civil justice, which is according to the best civil laws that the given society knows how to provide."

Fred. P. Stanton

Of Counsel for the Plaintiff in Error.

110-63

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

THE UNITED STATES EX REL. LA ABRA, &c., COMPANY
v.
FRELINGHUYSEN, SECRETARY, &c.
No. 995.

BRIEF FOR THE SECRETARY.

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

THE UNITED STATES EL REL. LA ABRA, &c., COMPANY
v.
FRELINGHUYSEN, SECRETARY, &c.
No. 995.

BRIEF FOR THE SECRETARY.

In general this case stands upon the same footing with that of *Frelinghuysen, Secretary, &c.*, v. *Key*, and therefore the brief for the Secretary in that case is relied upon also in this.

For the rest it is submitted in answer to the brief filed by the learned counsel for the plaintiff in error:

1. That the plaintiff in error cannot maintain a contention in a court of justice upon the convention of 1868 and the subsequent decision of the commissioners *unaided by legislation carrying these into effect.*

2. That the conditions imposed upon this claim by the act of 1878 as prerequisites to payment have not been performed.

could / 1. The plaintiff in error ~~cannot~~ maintain a contention in a court of justice upon the convention of 1868 and the subsequent decision of the Commissioners, *unaided by legislation carrying these into effect.*

The convention of 1868, proceeding upon the well-known principle that *as between two foreign nations* each has not only *dominion* but also *property* in all things within its territorial limits (Wheaton, Elem., sec. 163), provided for a settlement and satisfaction of all debts due by either government to citizens of the other by payment thereof *to the government of the creditor citizen.* So little were the rights of the citizen regarded as distinct from those of his government that it was specially provided that the government found to have the larger aggregate of claims should, upon the whole, recover only the balance after deducting what might be found due *by it* from what might be found due *to it.*

No provision exists in the convention for distribution by the creditor government amongst its own citizens of any recovery made upon their behalf. The words which engage *the President* to give full effect to the decision of the Commissioners (art. 11, quoted in brief for the Government in *Weil's* case, p. 5), which are claimed by the learned counsel for the La Abra Company as having that

effect, were obviously employed for a different purpose; for—

(*a*) The phrase "*the President*" in that connection means only *the United States*.

(*b*) But, if otherwise, all that was stipulated for was "to give full effect to such decision," *i. e.*, to a decision in favor of either United States or Mexico; in other words, that the President of the United States would give full effect to any decision in favor of Mexico, and *vice versa* the President of Mexico to such as were in favor of the United States.

(*c*) The suggestion that the United States became *trustees* as to any money recovered by them, considering the large sense of that word in this connection, does not affect the question as to their liability, or that of any of their officers, *before courts of justice* under the words of the convention alone. *For the duty thus spoken of as a* TRUST *in behalf of their own citizens is precisely of the same nature as that which required them originally to bring Mexico to terms upon account of those debts; i. e., it is presumptively a political trust, so that whether it has become a trust or other duty cognizable in courts must depend upon suitable specific language duly applied thereto.* In other words, besides the general *moral* obligation by the Government to the citizen it must appear that the latter has been clothed with a definite right of enforcement of that obligation by suit, either expressly or by an implication from certain duties thereabouts imposed by law upon some officer or other person.

No such right of enforcement is given here except by the act of 1878.

In this connection I again call attention to the circum-

stance that under the convention a part of the money recovered by the United States was to be used as an offset to the amount recovered by Mexico. It is obvious that the duty owed by the United States to their citizens in respect of the amount so used as a set-off was as perfect as with regard to that actually received from Mexico in cash. Obviously, however, there was no remedy, on account of the money set-off, until after an appropriation by Congress. This dealing with the fund by the convention marks it as "moneys of the United States," which any officer of the United States upon receiving them from Mexico under the convention without further legislation was required to pay into the Treasury (Rev. Stat., sec. 3621), from which, of course, ~~it~~ they could be drawn only after an appropriation.

Nor do the cases cited in this connection upon the other side, whether in the *Weil* or the *La Abra* case (*Mr. Goode*, p. 17; and *Messrs. Stanton* and *Shellabarger* and *Wilson*, p. 4), assert any other doctrine, inasmuch as upon attending to the facts involved in these cases it will be seen that they all agree in one particular, *i. e.*, that at the time when the court expressed its views upon the *conclusiveness* and *finality* of the action by the Commissioners *the political branch of the Government had become functus officio thereabouts, by doing all in its power to give effect to such action.* It follows that the language of the court did not concern the powers of the political department over questions in cases still (like the present) depending before it, but only the

powers *of the judiciary* over questions already passed upon by the political department in cases of which the latter had regularly been discharged, but which *afterwards* had to a certain extent come within the jurisdiction of the judiciary. "A claim rejected [before a commission] cannot be brought again under review in any *judicial* tribunal," are Justice Story's words in Comegys *v.* Vasse (1 Peters, p. 531, middle), and this language applies closely to the features of that case.

The cases relied upon as above by the learned gentlemen are as follows:

(*a*) Comegys *v.* Vasse (1 Pet. 193) was a case in which, by the treaty of 1819, the United States had agreed to pay to their own citizens certain debts originally due to them by Spain, and accordingly had actually paid his share thereof to one of the parties entitled. Afterwards a third person, upon claim of better right to such money, brought this suit against that party. The point suggested was whether any such question could be raised after the decision of the commission.

It appears by referring to the eleventh article of the treaty of 1819 that the payment of these debts was to be made *under the direction of Congress.* And so, in the event they actually had been before the bringing of this suit, by the act of 1824, Ch. 140 (4 Stat., 33).

The language in Comegys *v.* Vasse as to *conclusiveness* and *finality* is therefore to be referred to *a case in which a convention had been executed by action of Congress creating a commission* (act of 1821, ch. 39, 3 Stat., 639), *the decis-*

ions of such commission having subsequently been ratified by another statute, and also by actual payment.

(*b*) Clark *v.* Clark (17 How., 315).

This was a case betwixt an assignee in bankruptcy and the bankrupt in respect to a sum of money awarded and *actually* paid by Mexico, under an international commission betwixt that Government and the United States. The point was whether a claim against a foreign government (afterwards acknowledged and paid) be, as between a bankrupt and his assignee, *property*, even prior to any award thereupon under a convention. The decision that it *is* seems to have no connection with the question ~~of~~ the present case, which concerns the powers of a convention unexecuted by the political department.

(*c*) *Judson* v. *Corcoran* (17 How., 612).

This case resembles the above in presenting a question betwixt rival assignees of a sum that had been awarded and paid under a convention of Mexico, both assignments having been made before the award, and the decision turning upon comparative *diligence* in giving notice. Here also no question was presented as to the effect of an unexecuted convention.

(*d*) Reichart *v.* Felps (6 Wall., 160).

In 1788 Congress had provided that the governor of the Northwest Territory might determine certain questions

as to land titles and issue patents accordingly. He having done so, in 1812 Congress enacted that certain commissioners should revise such action. Thereupon it was held that the patents had created *property*, and that this could not be vacated by subsequent legislation. In this case, therefore, as well as in the above, the action of the political department was complete, and the thing in question turned over to the operation of ordinary law.

(*e*) Erwin *v.* The United States (97 U. S., 392).

Here it was held that a claim to the proceeds of captured and abandoned property, supposing it to be valid, is such a right as will pass to an assignee in bankruptcy even before judgment affirming the claim.

This case is, in principle, like those above of Comegys and Clark, a right to sue the United States having also been given by statute.

(*i*) Phelps *v.* McDonald (99 U. S. 298).

This, like Clark's case, was a contest betwixt an assignee in bankruptcy and the bankrupt over money awarded and paid to Great Britain under an international commission betwixt that Government and the United States. Here, also, under the finding of the court *that the money had been voluntarily paid by the agent of Great Britain to a receiver in the suit*, the case was that of a convention fully executed by the political department of that Government of which the party whose rights were in contention was a citizen.

(*l*) *Meade's case* (2 C. Cls. R., 224) was one in which the claimant's intestate, a citizen of the United States, had been a creditor of Spain. By the treaty of 1819 the United States released Spain therefrom and assumed its payment, its amount to be ascertained and awarded by a commission. The intestate failed successfully to prosecute his claim before the commission, and afterwards this suit was brought. It was held that the suit was barred by the failure before the commission.

The parties to the commission created under the treaty of 1819 were not, respectively, Spain and the United States, but the latter and certain of their own citizens. In regard to Meade therefore the treaty had been fully executed by the United States by a rejection of his claim, and therefore what has been said above as to the language of the court in Comegy's case (as regards *conclusiveness* and *finality*) may be repeated here.

(*m*) *Gibbes' case*. (13 Opinions of the Attorney-General, 19.)

In this case the convention of 1857 with New Granada had provided for an international commission to satisfy claims of citizens of United States against that Government, and that the commissioners should issue to the claimants, respectively, certificates of the sums so due, the aggregate thereof to be paid to the United States by certain instalments. Thereupon the act of 1861, Ch. 45, provided that all acknowledgment of such indebtedness by New Granada should be delivered to the United States; whereupon, "upon certificate of the board of commissioners," the United States would assume the debt and pay the

claimants apparently *at once*, looking to New Granada for reimbursement under the terms of the convention.

Thereupon Gibbes obtained an award against New Granada, but failed to obtain a formal *certificate* therefor. *New Granada* having been succeeded by *The United States of Colombia*, and a new convention with the United States having been entered into, a question arose about again submitting to the new commission the claims of Gibbes and several others in like condition. Attorney-General Speed advised that they should be so submitted, and so having been against the protest of Gibbes, they were dismissed.

These facts having been laid before Attorney-General Hoar he was of opinion that Gibbes could not be prejudiced by the action of the second commission, and in that connection he used these words: "I cannot assent to the view that this Government could affect his rights as against New Granada under the convention by submitting his case to the second board."

The *subject-matter* of this general language (to which therefore it is, by a well-known maxim, to be *restrained*) is certain action by the officials of the United States advised by the Attorney-General. The actual question was, how far such action could affect Gibbes' rights under the convention. Evidently, therefore, it was only the power of these persons that the Attorney-General had reference to when limiting those of this *Government*.

Under the first convention and corresponding action under the statute of 1861 Gibbes' claim had been established; and certainly no action of mere executive officers

of the Government could, against the will of the claimant, remit that claim to any more precarious condition.

The circumstances of Gibbes' case, therefore, do not at all show what would have been Mr. Hoar's opinion upon the effect of, say, a repeal of the act of 1861, or a modification thereof by Congress upon reasons seeming good to it (which of course would be treated as *good* by all other departments of the Government) to the effect that Gibbes' claim should be re-examined before being paid at the Treasury.

Upon the whole matter, therefore, it is submitted that there is neither principle nor authority for the suggestion that decisions of the commission under the Mexican convention of 1868 are judgments in the sense that they cannot at any time before fully executed be reconsidered at the pleasure of the sovereign parties thereto; or that, incase at some mesne stage of execution the practical questions connected therewith have become *domestic*, the sovereign within whose jurisdiction they arise may not so long as these remain political questions satisfy his sense of justice to any extent by investigating them anew, to the end, if it appear proper, of restoring the matter to the *statu quo ante conventionem*.

Consequently the act of 1878 is absolutely essential to the claim of the relator to bring this or any suit, and his remedy must be taken strictly as there defined.

2. *The conditions imposed upon this claim by the act of* 1878 *as prerequisites to payment have not been performed.*

In support of this proposition reliance is placed in general upon the brief for the Government in Weil's case.

In this place I will only restate somewhat more fully the position taken before as regards a new trial *under the direction of Congress* of the cases of *Weil* and the *La Abra Company*.

Upon this point section 5, reciting that Mexico has called the attention of the United States to those claims with a view to a rehearing, enacts—

That the President be requested to investigate any charges of fraud presented by Mexico as to those cases; and

If he shall be of the opinion that the honor of the United States, the principles of public law, or considerations of justice and equity require that the awards in those cases or either of them should be opened, and the cases retried, it shall be lawful for him to withhold payment of said awards or either of them,

Until such case or cases should be retried and decided in such manner as the Governments of the United States and Mexico may agree,

Or, until Congress should otherwise direct.

And in case of such retrial and decision any moneys paid or to be paid by the Republic of Mexico in respect of said awards, respectively, shall be held to abide the event, &c.

These provisions speak first of retrial in *general*, and then of a *special* retrial; *i. e., in such manner as the United States and Mexico may agree.* If the President shall be of opinion that for any one of several reasons enumerated there ought to be a retrial (*i. e. in general*,) then certain

consequences are to, or may, follow *until* an *international* retrial, or *until*, &c. The retrial which the President might recommend was not limited to that class of retrials spoken of under the former "trial."

When the political branch of the Government has practical control of a question any method by which, directly or indirectly, it ascertains the private rights concerned therein is a *trial* thereof; and supposing a first ascertainment thereof to be unsatisfactory, then, so long as its *control* continues, any method, *no matter how different formally from the first*, by it which makes a second such ascertainment is a *retrial*. Concurrence *in point of form* between the two methods of trial is a matter of no concern. So also if at one stage of the business the question is subject to joint sovereign jurisdiction only (say, as here, to that of the United States *and* Mexico) and is tried accordingly, and at a subsequent stage devolves upon one of these alone, another trial of the question, although under the latter sovereign alone, if this be merely in order to ascertain whether the other sovereign should not be released partially or altogether, is also a competent retrial. A convention between two governments is analogous to a deed by *indenture*. It binds *directly* only *the parties* thereto, and directly can be taken advantage of only by them. So also each can release the other from its obligations. All general words therein are to be referred to these fundamental propositions, the governing maxim being *unumquodque ligamen eodem ligamine*, &c. If before full execution thereof by their political department the United States could release Mexico from the convention, certainly they might beforehand institute any trial or investi-

gation whatever for the purpose of informing themselves of their duty thereabouts.

I submit, therefore, that the fifth section of the act of 1878 contemplates the chances of another trial than one that is international; the more so indeed that it seems strange that Congress, which for one alternative looked to a remitting of certain domestic questions (those betwixt the United States and Weil and the La Abra) to an *international* tribunal, did not at the same time have in view the propriety of settling these questions before a tribunal *of the same nature therewith*, viz, *domestic*. All the presumptions of reason seem to be against such an exclusion; so that it devolves upon those who say that Congress did not contemplate a *retrial* under its own auspices to show plain language of *exclusion*, or otherwise fail in their contention.

The brief terms in which Congress refers to its own contemplated action, by specifying merely the consequences thereof (in giving "direction" as to any previous *suspension* of payment ordered by the President), whereas it speaks in detail and at more than one point of the proposed international retrial and its effects, is in accordance with the maxim that a legislature cannot impose checks or other "form" upon the action of future legislatures; whereas when it turns a matter over to the operation of some other agency nothing is more common.

Again, the section provides, first, for a preliminary investigation by the Executive, to be followed by appropriate executive action (whether optional or imperative) which action, by virtue of the clause beginning ~~(above)~~ with the former "*until*," was to await ~~either~~ international action

upon the merits of the cases, or, by virtue of the second "until," "direction otherwise" by Congress. It seems that the Congressional action referred to in the second clause was intended to be action *upon the merits also.* This construction makes the two clauses parallel in purpose, as they are in point of general connection with the form of the sentence of which they are a part; and implies, as seems reasonable, that as the provisional action of the President was to be based upon inquiry *by himself*, so the final action by Congress in giving these directions or in declining to interfere at all, was to be based upon a trial of the questions involved *by itself*, directly or indirectly. It was not contemplated that Congress would take this *direction* of the matter without duly informing itself; *i. e*, in effect by a retrial.

S. F. PHILLIPS,
Solicitor-General.

110-76 14 Orig

IN THE

Supreme Court

of the United States.

FRANCIS SCHREIBER, Sr., et al.,

vs.

CHARLES L. SHARPLESS.

Petition of Plaintiff for a Rule for a Mandamus.

J. R. PAUL,
A. SYDNEY BIDDLE,
HENRY P. BROWN,
JOHN K. VALENTINE,
for Petitioners.

054

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IN THE

Supreme Court

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FRANCIS SCHREIBER, Sr., et al.,

vs.

CHARLES L. SHARPLESS.

Petition of Plaintiff for a Rule for a Mandamus.

J. R. PAUL,
A. SYDNEY BIDDLE,
HENRY P. BROWN,
JOHN K. VALENTINE,
for Petitioners.

IN THE SUPREME COURT OF THE UNITED STATES.

FRANCIS SCHREIBER, SR., GERHARD SCHREIBER, HENRY SCHREIBER, and CONRAD SCHREIBER, trading as SCHREIBER & SONS, who sue as well for the United States as for themselves,	U. S. District Court, Eastern District of Pennsylvania.
vs.	November Sess., 1880.
CHARLES L. SHARPLESS.	No. 38.

PETITION FOR A RULE FOR A MANDAMUS.

Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trading as Schreiber & Sons, who sue as well for the United States as for themselves, by their attorneys, John K. Valentine and A. Sidney Biddle, move the court for a rule upon the Honorable William Butler, Judge of the District Court of the United States, for the Eastern District of Pennsylvania, to show cause why a writ, commonly called a writ of mandamus, should not be issued out of the office of the Supreme Court of the United States, commanding him to reinstate a certain writ of *scire facias* issued in the above entitled cause, and to proceed and try the said cause, and further, to strike from the record a certain order, made by him in the said cause on the seventeenth day of April, 1883 (See copy of docket entries hereto annexed, marked "A"), whereby the said writ of *scire facias* was quashed, and thereupon to make such order or disposition of the said cause as

ought to have been made had the said order to quash the said writ not been entered.

The plaintiffs, who sue for the United States as well as themselves, are citizens of the State of Pennsylvania, transacting the business of photographers in the city of Philadelphia. The defendant, Charles L. Sharpless, now deceased, was also a citizen of the said state and a member of the firm of Sharpless & Sons, dry goods merchants, also doing business in Philadelphia. The plaintiffs had made and duly copyrighted under the acts of Congress, a photograph of the mother elephant "Hebe" and her baby "Americus." Notice of the granting of the copyright was printed upon each photograph in accordance with the act. The defendant authorized the making of a colored lithographic copy of the copyrighted photograph, to be used as a label upon some of their goods, and also as a circular for distribution. The plaintiffs, upon discovery of this infringement of their copyright, brought this *qui tam* action against the defendant in the District Court of the United States, for the Eastern District of Pennsylvania, to recover the penalty imposed for infringement of a copyrighted photograph, by Section 4,965 of the Revised Statutes of the United States.

After the case was at issue, but before trial, the defendant, Charles L. Sharpless, died. The plaintiffs thereupon the defendant's death having been suggested upon the record, and issued a writ of *scire facias*, according to the usual practice in such cases in the courts of Pennsylvania, and directed the marshal to serve the same upon the executors of the defendant in order that they might be made parties defendant in the suit. The latter then obtained a rule to show cause why this writ of *scire facias* should not be quashed, on the ground that the action for the recovery of the penalty provided for in the Federal Statute above cited, had abated by reason of the death of the defendant, and could not be revived by *scire facias* or otherwise, against his personal representatives. This rule was, upon argument, made absolute by the Judge of the District Court, and an order was thereupon entered by him on the seventeenth day of

April, 1883, quashing the said writ of *scire facias*, the court being of opinion that the action abated by reason of the death of the defendant. The written opinion was delivered, of which a copy is annexed marked "B."

The petitioners are thereby prevented from exercising their right to recover from the estate of the deceased defendant the penalties provided by Section 4,965, which they are advised they are entitled to do both under the laws of the State of Pennsylvania, and under the various acts of Congress made and provided in such cases, and are unable to prosecute further the above suit.

And the petitioners further say that they are without any remedy to compel the said District Court to reinstate the writ of *scire facias* and to proceed with the case.

Therefore your petitioners pray that the said rule to show cause why a writ of mandamus should not be issued upon said judge of the District Court aforesaid, may be granted, returnable to such a day as to your Honors may seem fit.

And your petitioners will ever pray, etc.

being duly

according to law, says:

I am one of the above mentioned petitioners. The facts stated in the foregoing petition are true to the best of my knowledge and belief.

and subscribed
before me this day of
A. D. 18

"EXHIBIT A."

COPY OF DOCKET ENTRIES.

U. S. DISTRICT COURT, E. D. OF PENNSYLVANIA.

November Sessions, 1880.

Valentine. A. S. Biddle. 38.		FRANCIS SCHREIBER, SR., GERHARD SCHREIBER, HENRY SCHREIBER, and CONRAD SCHREIBER, trading as SCHREIBER & SONS, who sue as well for the U. S. of America as for themselves,	Summons debt, $15,000 1881. Feb. 3, præcipe filed and summons exit; retble. first Monday of February, 1881.
		vs.	
E. Hunn, Jr.		CHARLES L. SHARPLESS.	
1881.	Feb. 7.	Writ returned "Served," Feb. 7, 1881.	
"	March 2.	*Narr.* filed and rule to plead in two weeks, or judgment *sec. reg.*	
"	" 16.	Plea of defendant filed.	
1882.	Nov. 24.	The attorney for the defendant, Ezekiel Hunn, Esq., by writing filed, suggests the death of the defendant in abatement of the action.	
1883.	April 6.	Præcipe filed, and *scire facias* against Anna R. Sharpless, Henry W. Sharpless, and Charles W. Sharpless, executors of the will of Charles L. Sharpless, requiring them to become parties defendant in this action, or show cause why they should not be made parties thereto by the judgment of the court. Exit; retble. Monday, twenty first day of May, A. D. 1883.	
"	" 16.	Mr. Hunn, attorney for the defendant in his life-time, moves that the *sci. fa.* be quashed.	
"	" 17.	And now, after argument by counsel, the motion to quash the writ of *scire facias* is granted, and the said writ is quashed, and the opinion of the court filed.	

"EXHIBIT B."

OPINION OF THE DISTRICT COURT.

Butler, D. J. The defendant having died, the plaintiff issued a *scire facias* to bring in his legal representatives. A motion to quash this writ raises the question before us. By agreement of parties the question was heard before the Circuit, as well as the District Judge.

That the cause of action terminated with the defendant's death, unless saved by statutory provision, is clear. That no such provision, in direct terms, is made by Federal statute, is equally clear. An act of the State Legislature preserves personal actions, generally, against abatement by death of parties, and the provisions of this statute are invoked by the plaintiff in support of his writ. That they are inapplicable, unless the Federal Legislature has provided otherwise, is also clear. It is urged, however, that such provision has been made; and in support of this position, our attention was directed, at the outset, to the Act of 1872, Section 914 of the Revised Statutes, relating to modes of proceeding and practice in civil causes, and to the provisions of the Judiciary Act of 1789, Revised Statutes, Sections 721 and 955. It is now conceded, however, that the Act of 1872 falls short of the case, and reliance is placed exclusively on the sections referred to of the Act of 1789. The first of these sections reads as follows:—

"Sec. 721. The laws of the several States, except where the Constitution or treaties of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."

That this section does not sustain the plaintiff seems quite plain. The laws of the States are made "rules of decision" in the Federal Courts in cases where they apply. That is to say, in cases where the Federal Courts obtain juris-

diction by reason of the *citizenship of parties*, the statutes and customs of the State, which lawfully affect their right, shall be regarded as rules of decision in passing upon such rights.

The section can have no application to cases in which the jurisdiction of the court arises out of the *cause of action*, and consequently involves rights over which the State Legislature can exercise no authority, except, of course, in so far as the section may relate to the method of proceeding and practice, and in this respect, it is virtually superseded by the clause, before referred to, of the Act of 1872.

Nor does the remaining section, 955, afford the plaintiff any better support. It reads as follows:—

"When either of the parties, whether plaintiff, petitioner or defendant, in any suit in any Court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend such suit to final judgment."

This simply provides for bringing in the legal representatives, where a party dies pending suit, in cases wherein the "cause of action survives by law." The purpose of the section is to give effect in the Federal Courts to State statutes, preserving causes of action cognizable in the State Courts, and over which the State Legislature may lawfully exercise authority, causes of action of which the Federal Courts obtain concurrent jurisdiction, by reason of the citizenship of parties. In the case before us the cause of action, founded upon a Federal statute, is beyond the reach of State Legislation. The local law invoked has, therefore, no effect upon it; is consequently inapplicable, and not therefore within the terms of the section, 955, above cited. All the cases invoked are consistent with this view.

Our conclusion, therefore, is, that the right of action terminated with the death of the defendant. Were it held otherwise, for the reasons urged by counsel, there would be one rule of action in this respect governing suits by the United States for penalties for infractions of its copyright laws in one State, and another in other States, dependent upon local legislation respecting the survival of action.

110-76

IN THE

Supreme Court of the United States.

FRANCIS SCHREIBER, *et al.*,	October Sessions, 1883.
vs.	
CHARLES L. SHARPLESS.	No. .

STATEMENT AND BRIEF.

Sur motion for a rule for a mandamus to the District Judge of the Eastern District of Pennsylvania.

J. R. PAUL,
A. SYDNEY BIDDLE,
HENRY P. BROWN,
JOHN K. VALENTINE,
for Petitioners.

N99

diction by reason of the *citizenship of parties*, the statutes and customs of the State, which lawfully affect their right, shall be regarded as rules of decision in passing upon such rights.

The section can have no application to cases in which the jurisdiction of the court arises out of the *cause of action*, and consequently involves rights over which the State Legislature can exercise no authority, except, of course, in so far as the section may relate to the method of proceeding and practice, and in this respect, it is virtually superseded by the clause, before referred to, of the Act of 1872.

Nor does the remaining section, 955, afford the plaintiff any better support. It reads as follows:—

"When either of the parties, whether plaintiff, petitioner or defendant, in any suit in any Court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend such suit to final judgment."

This simply provides for bringing in the legal representatives, where a party dies pending suit, in cases wherein the "cause of action survives by law." The purpose of the section is to give effect in the Federal Courts to State statutes, preserving causes of action cognizable in the State Courts, and over which the State Legislature may lawfully exercise authority, causes of action of which the Federal Courts obtain concurrent jurisdiction, by reason of the citizenship of parties. In the case before us the cause of action, founded upon a Federal statute, is beyond the reach of State Legislation. The local law invoked has, therefore, no effect upon it; is consequently inapplicable, and not therefore within the terms of the section, 955, above cited. All the cases invoked are consistent with this view.

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N99

FRANCIS SCHREIBER, *et al.*, trading, etc., who sue for the United States as well as themselves, *vs.* CHARLES L. SHARPLESS.	In the Supreme Court of the United States.

BRIEF *sur* petition for mandamus to United States District Court for the Eastern District of Pennsylvania.

STATEMENT OF FACTS.

This was a *qui tam* action in the United States District Court for the Eastern District of Pennsylvania, brought under Section 4,965, of the Revised Statutes, against Charles L. Sharpless. The section reads as follows:

"If any person, after the recording of the title of any map, chart, musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any painting, drawing, statue, statuary, or model or design, intended to be perfected and executed as a work of the fine arts, as provided by this chapter, shall, within the term limited, and without the consent of the proprietor of the copyright, first obtained in writing signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, or import, either in whole or in part, or by varying the main design with intent to evade the law, or knowing the same to be so printed, published, or imported, shall sell or expose to sale any copy of such map, or other article as aforesaid, he shall forfeit to the proprietor, all the plates on which the same shall be copied and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing printed, copied, published, imported or exposed for sale, and in case of a painting, statue or statuary, he shall forfeit ten dollars for every copy of the same in his possession or by him sold or exposed for sale, one-half thereof to the proprietor, and the other half to the use of the United States."

The plaintiffs, who were photographers, had made and copyrighted a photograph of the elephant *Hebe* and her baby

Americus. Notice of the copyright was printed on each photograph. The defendant was one of a firm of dry goods merchants, in Philadelphia, who had used a colored lithograph copy of the photograph as a label upon their goods, and as a circular for distribution. After the suit was begun the defendant died, and the plaintiffs issued a writ of *scire facias* (according to the usual practice in Pennsylvania, *Purd. Dig.*, 424, *pl.* 95), and directed the Marshal to serve the defendant's executors. The latter then obtained a rule to show cause why this writ of *scire facias* should not be quashed on the ground that the action for the recovery of the penalty, provided in the statute above cited, had abated by reason of the death of the defendant. This rule was, after argument, made absolute, and the writ was quashed.

The plaintiffs now petition this court for a rule to show cause why a peremptory mandamus should not issue directed to the Judge of the District Court of the Eastern District of Pennsylvania, commanding him to re-instate the writ and to proceed and try the case.

ARGUMENT.

The question raised in this case is whether or not an action to recover a penalty imposed by Congress for the infringement of a copyright survives after the death of the defendant.

By the statute law of Pennsylvania, an action for a penalty does not abate by the death of the defendant. The Act of February 24, 1834, Section 28 (*Pur. Dig.*, 424, *pl.* 96, *P. L.*, 77), provides as follows:

> "Executors or administrators shall have power to commence and prosecute all personal actions which the decedent whom they represent might have commenced and prosecuted, except actions for slander, for libels, and for wrongs done to the person; and they shall be liable to be sued in any action, except as aforesaid, which might have been maintained against such defendant if he had lived."

By virtue of this statute, the only actions now abating by death in Pennsylvania are those for "wrongs done to the person," and for libels and slander; and the only discussion

which has arisen in the courts of Pennsylvania has been directed to the question whether the particular action fell within either of these three classes. The point has never been mooted,—for it has never been doubted,—that an action to recover a penalty imposed by law survived after the death of the defendant and could be prosecuted in the State courts. Indeed, such an action is said to be, as far as possible, analogous to an action for debt; that every citizen is under an implied *contract* to the government to answer and pay any penalty imposed by law; and it is upon this *contract* that the action lies, and the action is *debt*.

See *U. S.* vs. *Mundell*, *infra*, p. 9, where this was decided by IREDELL, J.

Stearns et al. vs. *The U. S.*, 2 *Paine*, 311.

This was an action for a penalty imposed by Federal law.

Per THOMPSON, J.: "To sustain this suit is not administering the criminal law of the United States. Actions for penalties are civil actions, both in form and in substance, according to Blackstone. The action is founded upon that implied contract which every person enters into with the State to observe the law."

The language of Blackstone, in discussing the nature of the action of debt, is as follows:

"The same reason may with equal justice be applied to all penal statutes that is such acts of Parliament whereby a forfeiture is inflicted for transgressing the provisions therein enacted. The party offending is here bound by the fundamental contract of society to obey the directions of the Legislature and pay the forfeiture incurred to such persons as the law requires."

3 *Black. Comm.*, *161.

It was not questioned by the court, during the argument, that if the law of Pennsylvania with reference to the abatement and survival of actions was applicable to the case in hand, the action survived against the defendant's administrators; and during the argument on that point plaintiffs' counsel was stopped and directed to discuss the other question. The only question, therefore, for consideration, is whether or not the State law applies.

I. If the abatement or survival of an action, by reason of the death of a party, is a matter of procedure and prac-

tice, it is clear that by Section 914 of the Revised Statutes (being the Act of June 1, 1872, Section 5), the State law governing such questions is the rule of decision of the Federal courts. Section 914 of the Revised Statutes reads as follows:

"The *practice, pleadings,* and *forms and modes of proceeding* in civil causes other than equity and admiralty causes, in the Circuit and District Courts, shall conform as near as may be to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of the State within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding."

That the question of abatement of an action by death of a party is one of *procedure* was decided by Judge M'LEAN, in *Jones* vs. *Van Zandt's administrator*, 4 *M'Lean* 604 (1849). That was an action by the plaintiff, a citizen of Kentucky, brought in the Federal Court of Ohio, to recover from the defendant the penalty of five hundred dollars under the Acts of Congress of 1793, respecting fugitives from labor. The defendant pleaded not guilty, but died before the trial, and a *scire facias* was issued to revive the suit against his administrators. To this *scire facias* the plaintiff demurred. The court said:

"By the 64th Section of the Practice Act of Ohio, passed March 8, 1831, it is provided that no suit or action pending in any court except those mentioned in the 27th Section, which are actions of libel, slander, etc., shall abate by the death of either or both of the parties thereto. This section embraces all actions except those specified, which do not include the action under consideration. Consequently, this suit does not abate if the section apply to this court. The Act of Congress of 1828, adopting the State Practice, being prior to this Act, does not adopt it, and it has not been adopted by a rule of court. The Act of Congress of August, 1842, declares that "the provisions of an Act entitled 'An Act to regulate process in the courts of the United States,' passed May 19, 1828, shall be and they are hereby made applicable to such States as have been admitted into the Union since the date of said act." But this act can only apply to States admitted into the Union since 1828. Unless, therefore, this suit survives under the Judiciary Act of 1789, or the Act of Ohio of February 18, 1824, it must abate. It does not survive under the latter act, as the suit is not founded on an injury done to the property, either real or personal, of the defendant. And under the Act of Congress it does not survive, as that Act applies only to cases where the cause of action survives. The thirty-fourth section of that act, which declares "that the laws of the several States, except, etc., shall be regarded as rules of decision in trials at common law in the courts

of the United States in cases where they apply," has been held not to apply *to the process and practice of the courts. Wyman* vs. *Southard*, 10 *Wheat.*, 1 * * * There is no *practice* of the court in cases similar to the one before us, from which a rule of court may be presumed. From these considerations it appears that this action for a penalty abated on the death of the defendant, and there is no statute *or rule of court* under which it may be revived in the name of the administrator."

It appears, therefore, from this case that Judge M'LEAN decided:

1. That the question of abatement by death was one of "process and practice of the courts," which might be regulated by a statute of the State, or even by a rule of Court or by the *practice* of the Court.

2. That the Thirty-fourth section of the Judiciary Act was inapplicable "*to the process and practice of the Courts;*" and, therefore, did not cover the case in hand.

3. If the question had been one of substantial law, and not merely of *process and practice*, the Thirty-fourth section would have applied and the action survived.

4. That there was, when the case was decided, no act of Congress which made State process and practice applicable. (As does the Act of 1872.)

5. That (and for this reason only) the State practice and procedure was inapplicable.

So in *McCoul* vs. *Le Camp*, 2 *Wheat.*, 111 (1807). Chief Justice MARSHALL, discussing the right of an administratrix to revive by *scire facias* a suit which had abated by reason of her marriage *pendente lite*, says:

"The first error assigned (that is, the right to revive, as administratrix, a suit abated by marriage), is of some consequence, as the decision upon it furnishes *a rule of practice* for all the Circuit Courts of the United States."

That this is a matter of practice may also be inferred from the fact that Section 955, of the Revised Statutes, being Section 31 of the Judiciary Act of 1789, relating to the effect of the death of parties upon pending suits, and which will hereafter be referred to more fully, has been incorporated by the compilers of the Revised Statutes under the head of "Procedure," being Chapter 18 under title 13, "The Judiciary."

Therefore, by Section 914 (the Act of 1872), the State law governing the abatement of actions by death, was made the rule of procedure in the Federal courts, and, as we have seen, by the Pennsylvania State law an action in a like case, that is for the recovery of a penalty, would have survived against the representatives of a deceased defendant.

II. By the very terms, too, of Section 955, of the Revised Statutes (Judiciary Act of 1789, Section 31, already alluded to, p. 5), this action survived. The section provides:

"When either of the parties, whether plaintiff, or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, *in case the cause of action survives by law*, prosecute or defend any such suit to final judgment."

This statute provides that all actions survive, after the death of a party, where "the cause of action survives *by law*." What law? There is no other Federal law upon the subject, this being the only statute dealing with the question of abatement by death, and no *common law* governing Federal questions exists. Nor was it intended by Congress to incorporate the law of England as to abatement existing at the time of the passage of the Judiciary Act; for, if this were so, nearly all actions would at this day abate by the death of a party, if brought in a Federal court. The only other law, therefore, which can be referred to in the phrase "survives by law" must be the law of the State in which the action is brought, and this natural construction has been repeatedly adopted in the decisions.

In *Hatfield* vs. *Bushnell*, 1 *Blatch.*, 393 (1849), an action of ejectment was brought to recover lands claimed by the plaintiff, who having died intestate pending the action, his administrator, a resident of Vermont, moved for leave to enter and prosecute the action. On motion by the defendant, in the Federal Court of Vermont, to dismiss the action on account of the death of the plaintiff, PRENTISS, D. J., after citing Section 955, continues:

"The Act, it will be perceived, extends to every action and saves it from abatement by the death of the parties where the cause of action survives, whatever may be the nature of the action. *Whether or not in any particular cause the*

cause of action survives must depend altogether upon the local law. With that question the act of Congress has nothing to do. It does not profess to say what causes of action, nor, of course, what particular forms of action, shall or shall not survive, but refers this to the laws of the respective States. If in the present case the cause of action by the law of Vermont survives to the personal representative, and he might sue originally upon it, the action does not abate by the death of the plaintiff, but may be prosecuted by his administrator."

Having decided that the law of Vermont admitted an administrator in like case to prosecute the suit after the death of the plaintiff, the motion to dismiss the action was denied.

In *Barker* vs. *Ladd*, 3 *Sawyer* 44 (1874), the same question was discussed, and DEADY, D. J., says:

"It is admitted that under the law of the State (*Oregon Code Secs.* 365-6), and Section 34 of the Judiciary Act (1 Statutes, 81), this cause of action survived. The right of an administrator to maintain an action for such a cause is given by the law of the State, and such law, by said Section 34, is made "the rule of decision" in this court. Section 31 of the Judiciary Act, provides that upon the death of a party to an action in the United States Courts before final judgment, "in case the cause of action doth survive," the administrator of such deceased part may prosecute or defend, as the case may be. Neither this or any other law of the United States declares what causes of action shall survive; therefore, under Section 34 aforesaid, *the law of the State furnishes the rule on the subject*"

The court further decided that by the local law of Oregon, the application of the administrator to prosecute the suit had been made too late, and, therefore, his motion was denied.

Trigg vs. *Conway*, *Hempst.*, 711 (1855), *Detinue*, subsequent to the bringing of which both parties died.

DANIEL, J., sitting in the District of Arkansas, held that the action survived, citing the *Arkansas Statute* and *Hatfield* vs. *Bushnell*, *supra*. (See note).

Finally in the Supreme Court of the United States, in *United States* vs. *Boutwell*, 17 *Wall.*, 604 (1873), Judge STRONG ruled that an application for a mandamus against the Secretary of the Treasury, abated by reason of the removal from office of the latter, and that it so abated was *determined by the local law of the District of Columbia*, where the claim was instituted.

But it is argued that such a construction of section 955, as applied to cases of purely Federal cognizance, in the Federal Courts, would be productive of inconvenience from the lack of uniformity of decision arising in such cases, according to the varying State laws. But the inconvenience thus deprecated is of infinitely less importance than the grave and destructive consequences resulting from the opposite construction, which excludes all purely Federal cases from the operation of the section. For example, in patent and copyright suits (cognizable in Federal Courts only), the proceedings are usually protracted, and the death of parties to the record during the litigation is frequent. Yet if such a construction as is contended for, by the court below, be given to Section 955, there is no right to prosecute such infringement suits after the death of either plaintiff or defendant: the work of years is rendered futile, and after great expense and tedious litigation, a successful plaintiff is debarred from reaping in damages the fruits of his victory, by the death of his adversary before final hearing, or his family and representatives are deprived of all the rewards of the struggle by reason of his own death. Just such consequences were supposed and intended to have been avoided by the framers of the Judiciary Act, and yet they must follow if the operation of that Act is restricted to cases in which the Federal and States Courts have concurrent jurisdiction.

But where do we find warrant for the limited construction given to the section by the District Judge? The language is:

"In case the cause of action survives by law."

The learned Judge admits that in cases of concurrent jurisdiction the law referred to is that of the State. Has he any warrant in interpreting the word differently in reference to two cases brought in the Federal Court, simply because one of them might have been begun in a State Court? Or rather has he authority in the one case to obliterate an operative clause of an important law on the gratuitous assumption that the lawmakers did not intend it to apply to a case plainly indicated by its language?

That patent suits do *not* abate by reason of the death of the plaintiff seems clear. (*Hodge et al.* vs. *The Railroad*, 1 *Dillon*, 104 (1870). And the only principle by which such decisions can be sustained is that patent causes, and, therefore, all cases exclusively of Federal jurisdiction, survive by virtue of Section 955.

III. Even should it be held that the question under consideration is not one of procedure at all, but goes to the root of the action, then Section 34 of the Judiciary Act of 1789, (Revised Statutes, Section 721), applies and the action survived against the executors of the defendant. That Section reads as follows :

> "The laws of the several States, except where the Constitution, Treaties, or Statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States in cases where they apply."

This section has been held not to apply to cases of procedure. Assuming that the abatement and survival of an action is not a question of practice or procedure, then by the terms of this section, the *State* laws regulating such matters must be "rules of decision" in cases where they apply.

The only argument against the application of the section to this case must be similar to the one made in answer to the construction of Section 955 above contended for, namely, that it was not intended by Congress to conform the practice or the rules of decision of the Federal Courts, to the State law where the case in question was of purely Federal cognizance, but only to cases of concurrent jurisdiction. If it can be shown that under Section 721, cases exclusively cognizable in the Federal Courts, have nevertheless been decided in accordance with the State law provided in similar cases, then the law governing actions for penalties in the State Courts must also govern in actions of a like kind in the Federal Courts.

As early as the year 1795 this question was ably handled and decided by Judge IREDELL in *U. S.* vs. *Mundell*, 1 *Hughes*, 415. (U. S. C. C., Va., 1795.)

There the defendant was indicted under an Act of Congress for resisting the Deputy Marshal when serving upon him two writs of *capias ad res.* for a duty due on a still and a penalty under the Revenue laws respectively.

The defense was that the Marshal had no authority to require bail, and that the resistance was therefore lawful.

IREDELL, J., said:

"The single question then is whether in an action of debt at the instance of the United States in this Court for a penalty under an Act of Congress, the Marshal has a right to require bail of the party." * * * * * * * There being, therefore, no express provision of any act of Congress on this subject, it is our duty to see if there be an implied one. * * * Two different constructions have been contended for by counsel on both sides. One that, in this case, the law of Virginia alone is to be the rule by which we are to decide whether bail was demandable or not. The other that some general law must be the rule, it not being supposable that in a case of this kind Congress meant to refer to any local laws of the particular States, which might be inapplicable in all their circumstances to the cases of the United States, which it was contended, was the case expressly in this instance, the act containing exceptions in nowise applicable to the condition of the United States. * * *

After an elaborate and interesting review of the conditions under which the Federal government was established, and its effect upon the existing laws of the several States, the judge, having ruled that an action for a penalty under a statute was one of debt, and the trial of such an action a "trial at common law" within the terms of Section 34, of the Judiciary Act, continued:

"But I have no doubt that under the express reference by the Act of Congress to the laws of the several States as rules for our decision, fortified by the considerations I have stated, the law of Virginia, whatever it may be concerning the requisition of bail in actions of debt by the public upon penal statutes is that by which we are bound to decide on the present occasion. The question then is, what is the law of Virginia upon that subject?"

And having found that under the law and statutes of Virginia, no bail could have been required by the Sheriff in an action for a penalty, judgment was entered for the defendant, thus deciding in every particular the case in hand.

In *McCluny* vs. *Silliman*, 3 *Peters*, 270 (1830), an action for malfeasance in office was brought in the State of Ohio against the Register of the United States Land Office in

Ohio. The State Statute of Limitations barred the right of action against *State* officers for malfeasance, after six years.

The court (M'LEAN, J.) said, p. 277:

"It is contended, that this statute cannot be so construed as to interpose a bar to any remedy sought against an officer of the United States for a failure in the performance of his duty; that such a case could not have been contemplated by the Legislature; that the language of the statute does not necessarily embrace it, and consequently, the statute can only apply in cases of nonfeasance or malfeasance in office to persons who act under the authority of the State and are amenable to it. * * * The action on the case must be brought within six years from the time the cause of action arose, and it is immaterial what that cause may be; the statute bars the remedy by this form of action if it be not prosecuted within the time."

And it was held that the Ohio Statute of Limitations, as the law of the forum applied under Section 34 of the Judiciary Act, to *all* actions on the case in the Federal Courts.

Leffingwell vs. *Warren*, 2 *Black*, 599 (1862).

There an action of ejectment was brought in the Federal Court of Wisconsin, and was held barred by the State Statutes of Limitations, as construed by the eldest judicial decisions of the State Circuit Court. SWAYNE, J., saying:

"The Courts of the United States, in the absence of legislation upon the subject by Congress, recognize the Statutes of Limitations of the several States, and give them the same construction and effect which are given by the local tribunals. They are a rule of decision under the Thirty-fourth Section of the Judicial Act of 1789."

The cases above cited show that the judges of this court have, when the question has arisen, decided to import the Statute of Limitations of each State into actions brought in Federal Courts and concerning Federal matters. In the Circuit Courts those Statutes of Limitations have been held applicable even to *patent* suits, thus following Judge Iredell in *United States* vs. *Mundell*, extending the effect of Section 21 to cases of exclusively Federal jurisdiction, and deciding the present question. This is our very case, and unless overruled, the authorities are conclusive. The cases referred to are as follows:

Parker vs. *Hawk*, 2 *Fisher*, 58 (1857), (S. D. of Ohio). This was an action on the case to recover damages for

infringement of patent in the Southern District of Ohio. The State Statute of Limitations was pleaded.

LEAVITT, D. J., said: "The counsel for the plaintiff insists that the Limitation Act of Ohio does not apply to a cause of action arising under an Act of Congress. The argument is that as the power to grant patents for new and useful inventions, is vested exclusively in Congress by the Constitution of the United States, and the franchise of a patentee is created by Congressional legislation, no State law can affect or impair his right.

The question, as applicable to this action, is new in this court, nor has it been directly decided by the Supreme Court of the United States." * * * * After citing *McCluny* vs. *Silliman*, *supra*.

There would seem to be no doubt that the decision in the case referred to must control the pending question. It is true the cause of action in the case decided by the Supreme Court, was not the same as the case before this court. This is an action for the infringement of a patent right, but like the case of *McCluny* vs. *Silliman*, it is an action on the case, and, therefore, within the category of suits expressly barred by the Ohio Statute. * * * * In accordance with the views of the Supreme Court, it is barred by its denomination as an action on the case, without inquiry into the grounds of the action

I can perceive no objection in principle to the application of the doctrine established by the Supreme Court to this case.

Congress have omitted to prescribe any bar from the lapse of time to an action for an infringement of a patent right. It was, undoubtedly, within the competency of that body to have done so, and the case of copyrights they have exercised this power. Does it follow, because they have failed to establish a limitation in suits for infringement of patent rights, that the rights of the patentee to sue shall be indefinitely extended? And is it not expedient, while it violates no principle, that the legislation of the State shall be invoked to protect their citizens from the annoyance of being sued upon State claims for alleged infringements? * * * * There is no force in the argument that, in this view, it would be in the power of the State to defeat the rights of a patentee by prescribing a period of limitation so short as to render it impracticable to sue for an infringement. It is a sufficient reply to this that this objection does not exist."

[NOTE.—At a subsequent term the same question arose in the case of *Parker* vs. *Hall*, when Judge MCLEAN was sitting with the District Judge, and the ruling of the court was the same as in the foregoing case.

Sayles vs. *Richmond, Fred. & Pot., R. R. Co., E. D.*, of Va. (1879), 4 *Banning* vs. *Allen*, 239. (3 *Hughes*, 172.)

Suit in equity for infringement of patent. The same question of the Statute of Limitations was raised.

HUGHES, J., said: "First as to the Statute of Limitations. The thirty-fourth Section of the Judiciary Act of 1789 (Sec. 721 of the Revised Statutes of the United States), is the only general Statute of Limitations known in the

Federal legislation. In providing that the laws of the several States shall be the rules of decisions in trials at common law in courts of the United States, except where treaties or acts of Congress otherwise provide, Congress virtually adopted the Statute of Limitations of each State as the limitation of actions brought in the United States courts held in that State. This point is so thoroughly settled that it is useless for me to cite authorities upon the subject".

After allusion to the temporary Federal Statute of Limitations in patent cases of 1870, virtually repealed by the Revised Statutes, it not being incorporated therein, the judge ruled that the State law was applicable to the case.

Rich vs. *Ricketts*, 7 *Blatch*, 230 (1870), *N. D. of N. Y.* This was an argument upon a demurrer to the plea of the Statute of Limitations pleaded in an action on the case for infringement of a patent.

HALL, D. J., overruling the demurrer said: The plea is based upon the Statute of Limitations, of the State of New York; and it is not denied that the plea sets up a good defense, if this statute of New York is applicable to the case. No limitation has been prescribed by Congress in cases of this character, unless the State statute has been made applicable by the Thirty-first Section of the Judiciary Act * * which provides that the laws of the several States, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."

(Then after discussing the cases upon the question)

"It can hardly be necessary to restate the arguments presented by Judge Leavitt, in *Parker* vs. *Hawk* (*ubi supra*), or to refer to any additional authorities other than the case of *Leffingwell* vs. *Warren* (2 *Black*, 599), that case and the case of *McCluny* vs. *Silliman* (3 *Peters*, 270), cited by Judge Leavitt are more authoritative upon the question in controversy than any other decisions of the Supreme Court to which my attention has been directed; and these and numerous other cases in which the Statutes of Limitations of the respective States, as well as other State statutes have been held to furnish the rule of decision in the Courts of the United States, seem to require that the demurrer in this case should be overruled."

Howes vs. *Nute*, 4 *Fisher*, 263 (before CLIFFORD & LOWELL, J. J., U. S. C. C., Mass., 1870).

Bill in equity to restrain infringement of a patent.

CLIFFORD, J., said: "Suits in equity to recover gains and profits, or actions at law to recover damages for the infringement of letters patent, may be maintained in a proper case, even after the patent has expired, if the alleged infringement took place during the term for which the patent was granted, and the suit was commenced before the claim was barred by the Statent of Limitations. Claims of this kind may be barred by the Statute of Limitations; but no such defense is set up in this case."

Sayles vs. *Or. Cent. R. R.*, 6 *Sawyer* 32 (1879, Oregon). Action to recover damages for the unlicensed use of a patented car-brake.

DEADY, D. J., said: "Section 721 of the Revised Statutes re-enacts Section 34 of the Act of September 24, 1789, making the laws of the several States rules of decision in trials at common law, etc. Under this section it has been uniformerly held that where Congress had not otherwise specially provided, the State Statute of Limitations applies to actions in the National Courts.

"It follows from this statement of the case, that unless there is a saving clause in the repealing provisions of the Revised Statutes, the only statute now, or since June 22, 1874, applicable to this class of actions, is that of the State."

The judge further held that there was such saving clause in the Revised Statutes, which preserved all rights accruing prior to the repeal of the Federal Limitation Law relating to patents.

Finally in *Hayden* vs. *The Oriental Mills*, 15 *Fed. Rep.*, 605, the very latest case upon the question decided March 12, 1883, Judges LOWELL and COLT, sitting in the District of Rhode Island, decided a similar case of demurrer to pleas of the State Statute of Limitations in an action on the case for infringement of patent, in accordance with the case already cited.

Says Judge LOWELL: "This is an action at law, and if the statutes in question do not apply, there is no limitation, unless it be that of Rhode Island in 1789, for a court of common law has no discretion to refuse to entertain State claims.

This result appears to us to be inadmissible. No reason is given in any decision for excepting one class of cases out of Section 721 * * * There is no such exception in the statute itself, and none in its intent and purpose. Exclusive jurisdiction is given for reasons apart from this question * * * * This theory of the dependence of Section 721, upon concurrent jurisdiction, seems to be an echo of the rule that Courts of Equity, and, perhaps, even Courts of Admiralty, are bound by the State Statutes of Limitations in cases of concurrent jurisdiction, but it is not concurrent jurisdiction of the State Courts, but that of courts of common law, State or National, which decides the point. Besides, what is this concurrent jurisdiction? There are very few cases in which the jurisdiction is really concurrent. In nearly all the defendant has an absolute and conclusive right to make the jurisdiction of the Federal Courts exclusive, by a removal of the cause. * * * * It seems as inadmissible to say that Section 721 does not apply to patent cases, as that the law adopting the general practice of the States does not apply to them."

Thus we find that the Circuit Courts of Ohio, Virginia, New York, Massachusetts, Oregon and Rhode Island—a greatly preponderating weight of authority—have decided that State laws are to "be rules of decision" in such purely Federal cases as patent causes. If these cases are to stand, they decide the question in hand. Their reasoning is as applicable to penalties as to patents, to statutes regulating the abatement of actions, as to statutes of limitations.

To summarize the argument, if the question is one of procedure, Sec. 914, Revised Statutes, imports the State law for its decision, and the language of the Federal Act regulating the survival of actions (Sec. 955, Revised Satutes,) also renders the State law applicable; if not procedure, the State law is the "rule of decision" under Sec. 721, Revised Statutes.

IV. It remains to allude to the question whether mandamus is the proper remedy for the plaintiffs in a case like this.

That mandamus lies from this court directly to the District Court, was decided in *ex parte Bradstreet*, 7 *Peters*, 634, and 8 *Pet.*, 588, and *Stafford* vs. *The Bank*, 17 *How.*, 275, where writs were granted upon the District Judge. See also Revised Statutes § 688, where this court is given power to issue writs of mandamus "to any courts appointed under the authority of the United States."

The plaintiffs have no remedy by writ of error, for Section 1011, Revised Statutes, provides:

> "There shall be no reversal in the Supreme Court or in a Circuit Court upon a writ of error for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact."

The decision of a court upon a rule or motion, even though it involves a final determination of the case, is not the subject of a writ of error. By the express provisions of the Judiciary Act, a writ of error lies to this court only in cases of final judgments.

Toland vs. *Sprague*, 12 *Peters*, 331.

Moreover, mandamus will always lie if an inferior court has erroneously decided some preliminary objection of law, and refused to go into the merits of the case.